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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION

[Filed November 9, 1951]

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, National Furniture Traffic Conference, Inc., Plaintiff-Appellant, submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the United States District Court for the District of Massachusetts (hereinafter called the Court), made and entered in this cause.

Opinion Below

The opinion of the Court was rendered on September 5, 1951, and is unreported as yet. A copy of said opinion,

as amended, and a copy of the judgment are attached hereto and marked Appendix C and Appendix D, respectively.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review, upon direct appeal, the final judgment entered herein is conferred by Title 28, United States Code, Section 1253, which provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Inasmuch as this proceeding was brought to enjoin an order of the Interstate Commerce Commission (hereinafter called the Commission), it was a proceeding required to be heard and determined by a district court of three judges, pursuant to the provisions of Chapter 646 of the Revised Judicial Code, Section 2325 (62 Stat. 970, Title 28, United States Code, Section 2325). The judgment herein was a final judgment, entered on September 11, 1951. The plaintiff-appellant's application for appeal is presented herewith, on November 9, 1951, and accordingly within the period of time provided for the taking of such appeals, pursuant to the provisions of Title 28, United States Code, Section 2101(b).

The following decisions, among others, sustain the jurisdiction of the Supreme Court of the United States to review upon direct appeal the judgment herein: *Texas & Pacific Railway Co.* v. *United States,* 289 U. S. 627 (1933); *Mitchell* v. *United States,* 313 U. S. 80 (1941); *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1947).

Statutes or Treaties Involved

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

The construction of various provisions of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379; Title 49, United States Code, Section 1 et seq.), as amended (hereinafter called the Act), is involved, however. These provisions include the provisions of Section 1(4) and 1(5) of the Act (Title 49, United States Code, Section 1(4) and 1(5)), requiring the establishment and maintenance of just and reasonable, and prohibiting unjust and unreasonable, rates, fares and charges for railway transportation; the provisions of Section 2 of the Act (Title 49, United States Code, Section 2), prohibiting unjust discrimination between like kinds of traffic under substantially similar circumstances and conditions; the provisions of Section 3(1) of the Act (Title 49, United States Code, Section 3(1)) forbidding undue preference or advantage in favor of, and undue prejudice or disadvantage against, any "particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic"; the provisions of Section 14(1) of the Act (Title 49, United States Code, Section 14(1)), which define the obligations of the Commission with respect to reports made upon its investigations, and the provisions of Section 15(7) of the Act (Title 49, United States Code, Section 15(7)), which confer upon the Commission the power to suspend the operation of any new schedule of rates, pending investigation thereof, and which place upon the carrier proposing a new schedule of rates the burden of proving that it is just and reasonable.

Also involved in this proceeding is the matter of the construction of the provisions of Section 10(e) of the

Administrative Procedure Act (60 Stat. 243, Title 5, United States Code, Section 1009(e)) with respect to the scope of judicial review of decisions by administrative agencies.

Statement of the Case

This proceeding was instituted in the Court, pursuant to the provisions of Title 28, United States Code, Sections 1336 and 2321 through 2325, inclusive, to enjoin, set aside and forever annul a certain order of the Commission dated November 20, 1950, in proceedings entitled, respectively, I. & S. Docket No. 5677—*Furniture, L. C. L., From, to and Between the East;* I. & S. Docket No. 5694—*Furniture, L. C. L., From or to Illinois Territory;* and I. & S. Docket No. 5832—*Furniture, L. C. L., From or to Illinois Territory,* and officially reported at 279 I. C. C. 509. A copy of said order and of the Commission's report on which it is based are attached hereto and marked Appendix B and Appendix A, respectively.

The order of the Commission which the plaintiff sought to have enjoined, annulled and set aside has the effect of approving very substantial increases in freight charges on many articles of furniture and other non-furniture items (including baby walkers, clothes hampers, store display racks and stands, baby and doll carriages, gocarts and sulkies and other children's vehicles) when moving by rail in less-than-carload lots to, from and within the northeastern part of the United States. The Commission's order has such effect because it approves the cancellation by the principal rail carriers in Official Territory[1] of the high level first class and second class exceptions ratings, so-called, upon which these various furniture and non-furniture

[1] Official Territory comprises, generally, that part of the United States which is east of the Mississippi River and north of the Ohio and Potomac Rivers.

articles have been moving for approximately twenty years (a fact which belies the railroads' contention that such ratings are "depressed" and geared only to depression-period economics), and the substitution therefor of still higher classification ratings. The average amount of the increase in freight charges resulting from cancellation of the exceptions ratings is, as the Commission finds, between 58.7% and 76.3%, and these increases are made applicable to rates which have already been increased (in general rate increase proceedings) by approximately 80% since 1946.

The resulting increases in freight charges apply only upon shipments moved by the principal (but not by all) Official Territory carriers within Official Territory and upon interterritorial shipments to or from Official Territory points on their lines. The southern and western railroads are continuing the long-standing and more favorable exceptions ratings in force on shipments moving within and between their respective territories, and a substantial number of Official Territory carriers are also continuing such exceptions ratings on traffic to and from points on their lines.

In its appeal to the District Court, the plaintiff pointed out that, although the Commission's report contained the ultimate finding or conclusion that the schedules which contained the proposed new and drastically increased classification ratings "are just and reasonable and not otherwise unlawful", this ultimate conclusion was utterly devoid of support by adequate subsidiary findings, and that, moreover, the record before the Commission was wholly devoid of any evidence to support the Commission's ultimate finding or from which the Commission could have made subsidiary findings in support of its ultimate conclusion.

In support of its contention that the Commission's order is void by reason of the Commission's failure to support its ultimate conclusion by adequate subsidiary findings, the plaintiff first stressed the policy considerations underlying the rules laid down in such cases as *Florida* v. *United States*, 282 U. S. 194 (concerning the necessity for findings of the basic or quasi-jurisdictional facts); *Baltimore & Ohio R. C.* v. *United States*, 22 F. Supp. 533 (wherein Judge Hand pointed out the necessity of findings of the basic facts to the extent necessary to reveal the legal theory on which the Commission had proceeded) and *Erie R. Co.* v. *United States*, 64 F. Supp. 162 (wherein the Commission's reliance upon facts "conceivably known" to it but not in evidence was specifically denounced). These rules have a common vital purpose in that they all are designed to safeguard the right of judicial review of Commission orders and to prevent Commission proceedings from degenerating into mysterious rites from which a court would be expected to retreat in noncomprehending awe.

To support its contention that the Commission's ultimate conclusion is, in fact, not supported by *adequate subsidiary findings*, the plaintiff analyzed the report in detail (and urged the Court to do the same), in search for *any basis* in such *findings* as the Commission made for its ultimate conclusion that the classification ratings which it was approving are "just and reasonable and not otherwise unlawful."

So far as concerns the matter of justness and reasonableness (the Section 1 issue), the plaintiff pointed out that, while the Commission had made various findings concerning the transportation characteristics of furniture, such as that furniture has particular *average* value, density, and bulk and that its movement is, on the *average*, in certain quantities and for certain distances, the Commission at no time erected any bridges over which rational human beings

could pass from these findings to the Commission's ultimate conclusion of reasonableness of the classification ratings which it permitted to become effective. Thus, as the plaintiff demonstrated to the Court, the Commission in no way indicated why commodities having the average characteristics referred to might reasonably be charged what the railroad respondents proposed to exact through their new and vastly increased ratings and, *a fortiori*, why those *average* characteristics justified the railroads in charging on *certain types* of furniture first class rates and on *other types* of furniture 1½, 1¾ and even 2 times such first class rates, particularly in view of the fact that, *for twenty years, all assembled furniture* has moved, in less-than-carload lots, on first class rates, and *all knocked-down furniture* has moved on 85% of such first class rates.

The plaintiff further pointed out that the Commission's report not only does not contain cost-of-service findings which support its ultimate conclusion, but also that the report affirmatively shows, and the Commission actually finds, that the cost evidence before it was so inconclusive that the Commission *could not even find the former exceptions ratings to be non-compensatory*, and that the Commission *accordingly could not find justification, in such evidence, for the tremendous increases* (averaging between 58% and 76% and reaching 100% in many instances) *inherent in the classification ratings which it approved.*

Plaintiff further called to the attention of the Court the fact that, in classification "reasonableness" proceedings, the customary basic and subsidiary findings (and the *essential* findings in such proceedings, according to repeated Commission expressions, as well as statements of leading writers in the field) are findings of comparison, namely, findings that other commodities (comparable from a transportation point of view) are customarily charged the same

rates, and that, in view of the absence of adequate cost findings, such findings, and such findings alone, could give validity to the Commission's findings that furniture has the transportation characteristics which warrant the proposed ratings. The Commission's report will, the plaintiff pointed out, be searched in vain for any findings of this essential type, unless the Commission's reference to its 1931 decision in the so-called *Furniture*[2] proceedings is intended as such a finding, and if it is so intended the finding does not provide support for the Commission's ultimate conclusion. The particular finding is,

> "The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra,* and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis."

In demonstrating to the Court (and the Court apparently accepted the plaintiff's contention in this regard for it completely ignored the decision in the *Furniture* proceeding in its opinion) that this finding affords no support for the Commission's ultimate conclusion, the plaintiff first called attention to the fact that none of the non-furniture items involved in this proceeding were included in the *Furniture* investigation, that there is accordingly no direct relationship between the earlier proceeding and the non-furniture items in this proceeding and that no indirect tie exists, because the Commission has made no finding, and there is no evidence, that the non-furniture items involved in the current proceedings are comparable, from a transportation standpoint, with furniture. The plaintiff further pointed out that the earlier *Furniture* decision provides no proper basis whatsoever for the Commission's conclusions relative

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[2] *Rate Structure Investigation, Part 5, Furniture,* 177 I. C. C. 5 (1931) referred to in the Commission's report, and herein, as *Furniture.*

to the present classification ratings even on furniture, for the reason that the evidence of record shows that the less-than-carload recommendations made in the original *Furniture* proceeding were discredited from the very outset, that the Commission reopened the proceeding for the specific purpose of reconsidering such recommendations (and ultimately closed the proceeding without further action only because the carriers had adopted the present exceptions ratings and rendered the issue moot), and that even if the recommendations had had original validity, changes in circumstances directly bearing upon the correctness of those 1931 ratings would, in the intervening *20-year period*, have made the recommendations obsolete and products of an entirely different economic era. In fact, the evidence underlying the *Furniture* proceeding decision would not even be admissible in this or any other proceeding today because of the staleness thereof (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248 (1932)).

So far as concerns the matter of undue discrimination (the Section 2 issue), the plaintiff demonstrated to the Court that shippers had established, before the Commission, a *prima facie* case of Section 2 violations by showing that under the challenged classification ratings *identical items of furniture carry different ratings* and consequently pay different rates *depending upon their intended use*, and also that many items of furniture, so substantially similar as to be entitled to equal treatment pursuant to Section 2, are assigned different ratings and accordingly afforded unequal treatment. Typical illustrations were cited to the Court, including the case of furniture which, if the same article were sold as a vanity base, would move on a first class rate but, if sold as a desk, would be charged fifty per cent more, or 1½ times such first class rate. A further illustration indicated that, under the classification ratings approved by

the Commission, an overstuffed sofa is assigned a first class rating, whereas its *matching counterpart*, an overstuffed chair, must be charged *1¾* times such first class rate, *notwithstanding the fact that the two pieces have virtualy the same density and value characteristics*, and obviously are identical in all transportation characteristics relating to movement and handling, since they almost invariably are sold and shipped in sets. The plaintiff further pointed out to the Court that the Commission's report is utterly silent with respect to the Section 2 violations to which its attention had been so specifically directed, and that accordingly it is impossible to contend that the Commission has made adequate particular findings or, in fact, any particular findings to support its conclusion that the classification ratings are not unlawful in so far as that conclusion purports to bear upon the Section 2 issue.

So far as concerns the matter of undue preference and prejudice (the Section 3 issue), the plaintiff, as in the case of the Section 2 issue, demonstrated to the Court that shippers appearing before the Commission had established a *prima facie* case of Section 3 violations by showing that, in many instances, following establishment of the new high classification ratings within Official Territory and on interterritorial shipments to and from Official Territory, particular shippers would be placed at a substantial rate disadvantage in attempting to compete with other shippers shipping their freight under similar circumstances, and that the same carrier or carriers would be parties to the arrangement giving rise to such unequal treatment. The plaintiff further pointed out that, while the Commission's ultimate conclusion of lawfulness dealt with the matter of unlawfulness under Section 3, the only subsidiary findings of the Commission with respect to the Section 3 issue were the negative finding that,

> "As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice",

and the obscure finding that

> "There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice",

and that neither of these findings could properly support the Commission's ultimate conclusion relative to Section 3 lawfulness. Both findings involved and rested upon errors of law. In the case of the above first quoted finding, the burden of proof requirements of Section 15(7) of the Interstate Commerce Act were ignored and, in the case of the above second quoted finding, the law as recently stated by the United States Supreme Court in *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573 (1948) with respect to a carrier's responsibility for participation in an unduly preferential and prejudicial rate adjustment was disregarded. As a consequence, as the plaintiff pointed out, the Commission's ultimate conclusion of lawfulness with respect to Section 3 was clearly without support of an adequate subsidiary finding.

The plaintiff further demonstrated to the Court that the evidence before the Commission wholly failed to support its ultimate conclusion. Thus, in analyzing for the Court the evidence in the proceeding, the plaintiff was able to find evidence supportive of most of the findings which the Commission made with respect to certain *average* characteristics of furniture from a transportation standpoint, but wholly unable to find any evidence which would instill meaning into those findings, or which would develop any relationship between the characteristics so found and even the general

level of the classification ratings, let alone the particular ratings proposed for particular furniture items. Thus, even if the Commission had made adequate cost findings and there were evidence to support the same, there was clearly no evidence whatsoever with respect to *reasonably anticipated revenue under the proposed ratings*, which evidence is obviously necessary to relate the cost evidence to the issue of the reasonableness of the proposed ratings. As the plaintiff effectively demonstrated to the Court, there plainly was no evidence before the Commission from which the Court, even if it were proper for it to do so, could infer or supply the missing adequate subsidiary findings which are essential to the validity of the Commission's ultimate conclusion, and hence its order.

The plaintiff, on the basis of the foregoing, urged that an injunction be issued and further pointed out to the Court that, contrary to the contentions of the railroad respondents, individual shippers who had been and would be subjected to overcharges, discrimination and undue prejudice under the classification ratings schedule would be unable to obtain reparations relief therefor if the Commission's present order approving the classification ratings were permitted to stand. In this connection the plaintiff referred to the decision of the United States Supreme Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1931) and to the rationale thereof that carriers are entitled to rely upon findings of the Commission in proceedings unappealed and unreversed to which they are parties, and that the Commission, having made a finding of reasonableness,

> "may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now

holds it should have decided in the earlier proceeding to be a reasonable rate." (P. 390.)

The Rulings Below

The Court properly summarized the governing rule of law with respect to the adequacy of Commission *findings*. Thus, the rule is correctly stated as requiring

> "that the report of the Commission must contain sufficient basic or subsidiary findings of fact, (which ought to be clearly stated and identified as such so that a reviewing court will not be groping in the dark for the grounds of the Commission's ultimate conclusion) to warrant the reviewing court in concluding that the Commission had rational grounds for . . . (its decision)."

The Court's purported application thereof in this proceeding, however, if sustained, would, in practical effect, nullify and abrogate that rule. The Court concluded that an examination of the Commission's report in the instant case "shows that it lived up to the rule." In support of this the Court said, with respect to the matter of "reasonableness" under Section 1 of the Act, that "well over a dozen subsidiary findings were made." These are the findings which the plaintiff concedes were made, but which the plaintiff submits are meaningless unless and until they are (as they cannot be) in some way related to the ratings in issue. The Court makes no effort to relate the findings to the Commission's ultimate conclusion of reasonableness, and it appears not to be concerned at the Commission's failure to indicate the relationship. Moreover, although the Court appears to recognize[3] that some form of rate com-

[3] As indeed the Court must in view of the inadequacy of the cost findings (see page 7 hereof) and the absence of any evidence as to anticipated traffic and revenue under the proposed ratings to enable it to relate the cost findings (if they had been adequate) to the ratings in issue (see pages 11 and 12 hereof).

parative process is essential (see pages 7-9 hereof for summary of plaintiff's contentions in this regard), the Court is apparently willing to allow that part of the administrative process to become a mysterious rite, beyond the Court's supervision, and the requirements of evidence. Thus, the Court in effect says that it will "*assume*" that the Commission bridged the gap between "furniture has certain characteristics" and "furniture may properly be charged particular rates" and that it will not insist either that the Commission say that the gap is bridged or reveal the general technique, if any, which was employed in bridging the gap. Such is the apparent intendment of the Court's curious statement that,

> "Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity even though it may say nothing as to the rate scale at large."

This language is, of course, directly in conflict with the oft-stated rule that administrative agencies must decide cases on the basis of the evidence before them and not on the basis of other facts "conceivably known by them." *Erie R. Co.* v. *U. S. (supra).*

So far as concerns the Section 2 and Section 3 issues, the Court not only wholly ignores the absence of any subsidiary finding bearing upon the matter of discrimination in violation of Section 2 (see pages 9 and 10 hereof), it further ignores the error as to burden of proof and the erroneous application of the "rate participation" doctrine, respectively, underlying the two subsidiary findings (see page 11 hereof) with respect to undue preference and prejudice in violation of Section 3.

Nor does the Court rely upon the *evidence* to supply the

omissions to which the plaintiff has so consistently referred. Although the Court refers to the record as voluminous, saying that

> "To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the 'begat' chapters of the Book of Numbers.",

the Court does not find, as indeed it could not find, that the evidence supports the Commission's ultimate conclusion. The Court's statement with respect to the evidence is that the

> "records before the Commission disclose adequate evidence, although some of it is typical or representative, to be sure, *to support the subsidiary findings made.*" (Emphasis supplied.)

This statement is meaningless, however, in view of the obvious inadequacy, hereinbefore pointed out, of "*the subsidiary findings made.*" Thus, we find, in connection with the Section 2 issue of discrimination, no "*subsidiary findings made*" whatsoever. In the case of the Section 3 issue of undue preference and prejudice, the report contains two "*subsidiary findings made*" but both are erroneous as a matter of law, and accordingly lend no support to the Commission's ultimate conclusion of lawfulness, so that inquiry as to whether such "*findings made*" are supported by evidence is a mere academic excursion. So far as concerns the issue of reasonableness under Section 1, the "*subsidiary findings made*" with respect to certain average transportation characteristics of furniture are, as plaintiff concedes, supported by evidence, but there are no "*subsidiary findings made*" to bridge the gap between such findings and the Commission's ultimate conclusion that the classification ratings are reasonable, and there is no evidence whatsoever

upon which such "bridge" findings could have been based. The Court, in effect, frankly so concedes when after "a careful examination" of the record it is forced to say that it only "assumes" that the Commission had available to it some means of bridging the gap. So also, in the case of the cost evidence, the Court apparently concedes the lack of any relating evidence. Thus, if the Commission's statement near the end of its report to the effect that "the classification ratings will do no more than compensate the carriers" can be regarded as a "subsidiary finding made" (and it seems to the plaintiff incredible that it could be in view of the Commission's immediately preceding finding that the cost evidence is so inclusive as only to create doubts concerning the compensatory nature of the *much lower* exceptions ratings), such "finding" is not, and cannot be, on the record before the Commission, related to the classification ratings in issue, because there was offered no evidence whatsoever relating to the probable volume and nature of traffic movement to be anticipated under the new ratings. It may well be that, as the Court says,

> "The process of rate making involves the weighing of imponderables, the making of predictions as to future traffic, and presumptive reasoning from available data."

Such "weighing", "predicting", and "reasoning", however, are, under due process of law, required to be based upon evidence of record. There was no evidence to which the Commission could direct its attention and energies in this regard, and the omission is not to be overlooked so casually as the Court does when it says,

> "Who can tell in advance, for instance, how much traffic will move by rail and how much will be diverted to trucks by the higher rates?"

The problem may not be easy of solution, but the duty of a carrier proposing a change in rates is, under Section 15(7) of the Act, to introduce evidence which the Commission can evaluate in endeavoring to make a reasonable prediction. When, as here, no evidence is offered, the carriers' cause must fail.

The Questions Involved Are Substantial

The questions presented by this appeal are substantial and of far-reaching importance. From the standpoint of the general public interest, the issues herein raised as to whether judicial review of administrative action is to be so narrowed as virtually to become a nullity are of great significance. From the standpoint of the direct and immediate interest which the plaintiff and the many others whom it represents have in the maintenance of reasonable and nondiscriminatory freight rates, the issues are also of very substantial importance.

So far as concerns the preservation of judicial review of administrative action, the Court's decision herein will determine, we submit, whether an appellant must anticipate a virtual refusal by a reviewing court to go beyond the ultimate conclusions of the agency in an appeal proceeding challenging a report and order of the Commission. The rulings of the Court in the instant case, as hereinbefore pointed out, manifest an extremely restrictive attitude towards judicial review which comes dangerously close to complete abrogation of that function.

Thus, the plaintiff's charge that the Commission had failed to make adequate subsidiary findings to support its ultimate conclusion was brushed aside by the Court with the assertion that "typical or representative findings resting upon typical or representative evidence" were made by the

Commission, and that these were sufficient, without any discussion of the plaintiff's plainly demonstrated contentions that the "typical and representative findings" referred to in no way bear upon the issues of Section 2 and Section 3 unlawfulness, concerning which the plaintiff established *prima facie* cases of violation before the Commission, and are, without additional findings supported by substantial evidence, clearly irrelevant to, and of no assistance in, determining whether the Commission correctly decided that the new and greatly increased freight ratings are just and reasonable. It is true that "typical or representative findings" are all that are required, but this means merely that, if the Commission had found, based on substantial evidence, and with respect *to a representative cross section of all the furniture and non-furniture items involved herein*, that the new, higher freight ratings were necessary to assure a reasonable margin of profit, or that the proposed ratings would be no higher than those presently in effect on other articles having substantially similar transportation characteristics, it would then be unreasonable to require findings, based on equally convincing proof, of the same facts for each of the furniture and non-furniture items included in the new schedules. The "typical and representative findings" rule is thus but a refinement of the rule for testing the adequacy of Commission findings, and is by no means a substantive substitute for the basic rule of judicial review. The "typical and representative findings" which are required must still relate to and *support* the Commission's ultimate conclusion. Findings which relate to a Section 1 issue may not just be "assumed" to be supportive of the Section 1 conclusion, nor may findings which relate only to a Section 1 issue be used to buttress Section 2 and Section 3 conclusions, which are otherwise wholly without support.

The Court's reluctance in the instant case to interfere in any way with the Commission's obviously invalid order is, of course, regrettable, and the unfortunate situation in which furniture shippers find themselves is not alleviated by the presence of any readily available alternative remedial process. Thus, although the Court states in its opinion that,

> "if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materializes, remedial process is readily at hand under the Act" (P. 15),

the fact is that if the Commission's affirmative ultimate conclusion in this case that the classification ratings "are just and reasonable and not otherwise unlawful" is upheld as proper, later collateral attack upon such ratings by an individual shipper would be precluded. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 381. As the Court there said, the Commission, having made a finding as to reasonableness,

> "may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate" (P. 390).

In this connection, the case of *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 (1943), in which rate attack was permitted, is plainly distinguishable. In that case, the Commission had made no finding that the rates were just and reasonable and not otherwise unlawful. On the contrary, its seal of approval had been expressly withheld and the Court specifically called attention

to the fact that the issue of undue preference and prejudice was thus left open by the original decision of the Commission. In the instant case, on the other hand, there are affirmative findings of reasonableness and of freedom from other unlawfulness, and the principle stated in the case of *Arizona Grocery Co.* is accordingly applicable.

That the issues herein are substantial because of their major and immediate importance to the furniture industry throughout the country is obvious from the facts of record with respect to the nature and character of that industry. The Commission has found that "the furniture industry is one of the largest of the consumer durable-goods industries." As the Commission has also found, however, the industry is composed principally of small manufacturers, most of whom do not individually make complete lines of all types of furniture, or run their lines through the entire range of values and quantities. Moreover, so far as concerns marketing, the industry is one of small retailers, with relatively few wholesalers. Two circumstances, important because of their direct bearing on this proceeding, follow from the above-described nature of the industry. The first is that because the industry consists largely of small manufacturers and small retailers, *less-than-carload rates* are of tremendous concern to it. The Commission has found that of all shipments of furniture from points in Official Territory in 1948, 80% were less-than-carload shipments. The second circumstance is that most furniture manufacturers cannot market their particular products solely in their immediate vicinities and are therefore dependent on shipping their products substantial distances. Because of these two circumstances, the furniture industry is, of necessity, vitally affected by increases in freight rates on less-than-carload shipments within, from, and to Official Territory, such as those proposed by the carriers in the

instant case. The economic future of a large part of the furniture industry is dependent upon the outcome of this proceeding.

Respectfully submitted,

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APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 5677 [4]

FURNITURE, L.C.L., FROM, TO AND BETWEEN THE EAST

Submitted October 24, 1950. Decided November 20, 1950

Proposed Increased Less-than-carload Ratings on Furniture and Related Articles Between Points in Official and Illinois Territories, and Between Points Within Those Territories and Points in Southern, Western Trunkline, and Southwestern Territories, Found Just and Reasonable, and Not Otherwise Unlawful. Orders of Suspension Vacated, and Proceedings Discontinued.

Francis L. Brown, Leo P. Day, Guernsey Orcutt, and William B. Johnson for respondents.

R. F. Bohman, J. T. Ryan, Leonard Mongeon, W. G. Burnette, Stephen P. Dunn, T. H. Burgess, H. R. Fritz, Harry B. Spamer, Hyman I. Fischbach, Robert DeKroyft, and Leslie LaCroix for protestants.

REPORT OF THE COMMISSION

Division 3, Commissioners Rogers, Patterson, and Johnson

By DIVISION 3:

Exceptions were filed by the protestants to the report proposed by the examiner, to which the respondents replied, and the issues have been argued orally. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given due consideration and found not justified.

By schedules filed to become effective on July 15, 1949,

[4] This report also embraces Investigation and Suspension Docket No. 5694 Furniture, L.C.L. From Or To Illinois Territory, and Investigation and Suspension Docket No. 5832, Furniture, L.C.L. From Or To Illinois Territory.

and later dates the respondents, the principal rail carriers operating within official and Illinois territories, proposed cancellation of exceptions ratings on furniture and related articles, in less than carloads, between points in official and [5] Illinois Territories and also between points in those territories and points in southern, western trunk-line, and southwestern territories. Upon protest of various individuals and organizations representing the furniture industry in official, southern, western trunk-line, and southwestern territories, the effective dates of the schedules were suspended until February 14, 1950, and later dates, and they have since been voluntarily postponed by the respondents pending disposition of the proceedings.

The furniture industry is one of the largest of the consumer durable-goods industries. It is made up largely of small manufactures, located in relatively small cities or towns, and retail distributors. There are relatively few wholesale distributors of furniture. The bulk of the rail movement is in less-than-carload quantities.

In furniture production and the marketing thereof official territory is the most important region in the country. The production in that territory was 66 percent of all furniture produced in the United States in 1947, and sales were 53 percent of the total sales by all furniture stores of the country in 1948.

The ratios of less-than-carload shipments of furniture to all shipments of furniture by rail during 1948 were as follows: Between points in official territory, 80.4 percent; from points in official territory to destinations in all territories, 77.9 percent; and from origins in southern territory to points in official territory, 45.5 percent. The less-than-carload movement from official territory to western territory comprised 25.3 percent of the total movement from official territory to all territories.

The exceptions ratings, which would be cancelled by the suspended schedules, generally provide for less-than-carload ratings of first class on furniture shipped set up and second class on knocked-down shipments. Since the classi-

[5] Following the usual practice all of Illinois territory will be treated as part of official territory.

fication provides for ratings as high as double first class for many items of furniture in less-than-carloads, the exceptions produce a basis of rates substantially lower than the classification basis which would apply in the absence of the exceptions.

The exceptions ratings were established in 1932 to enable the respondents to meet the then unregulated motor-carrier competition and to give financial assistance to the furniture industry during the economic depression of 1930-1939. The record indicates that more than 40 percent of the furniture produced and marketed in official territory is now transported by trucks, and in 1948 the furniture industry was in better financial condition than at any time during the last 20 years.

The classification ratings, which will apply if the suspended schedules become effective, stem from the Commission's findings in Furniture, 177 I. C. C. 5, a nationwide investigation of all rates on furniture and related articles, decided July 28, 1931. In dealing with the issues pertaining to less-than-carload traffic, the Commission found, at pages 116-117, that maximum reasonable less-than-carload ratings, in the three major classifications, on furniture and related articles having individual values ranging from 15 to 25 cents per pound would be those which substantially conform to the following table of grouped weights per cubic foot:

3 pounds and under	3 times first
Over 3 pounds and including 3.75 pounds	2½ times first
Over 3.75 pounds and including 4.75 pounds	2 times first
Over 4.75 pounds and including 5.75 pounds	1¾ times first
Over 5.75 pounds and including 7.25 pounds	1½ times first
Over 7.25 pounds and including 9.50 pounds	1¼ times first
Over 9.50 pounds and including 12.50 pounds	First
Over 12.50 pounds	Second

Pursuant to the findings and order therein entered, the respondents,[6] effective February 25, 1932, established revised classification ratings determined according to the prescribed table of weight densities, and at the same time they canceled then-existing exceptions ratings and commodity rates on furniture in less-than-carloads. Following

[6] Other carriers took similar action.

conferences between carrier and shipper representatives, the carriers, in February 1933, adopted the following table of weight densities with reduced ratings, as a substitute for the one prescribed:

3 lbs. and under	D1
Over 3 lbs. and including 4 lbs.	1¾
Over 4 lbs. and including 5 lbs.	1½
Over 5 lbs. and including 6½ lbs.	1¼
Over 6½ lbs. and including 9½ lbs.	1
Over 9½ lbs.	2

Reduced classification ratings based upon this table were established in May 1933, and, as clarified and further reduced on December 31, 1940, they are still in effect. As is apparent, the present, or proposed classification ratings are substantially lower than the bases prescribed in *Furniture, supra.* The furniture on which they would apply (in the absence of exceptions) is of much higher value than that contemplated by the findings in that proceeding. In October 1949, furniture shipped from official territory origins to New York, N. Y., and Philadelphia, Pa., ranged in invoice value from 40 to 50 cents per pound, and that from southern origins to the same points varied from 29 to 34 cents per pound. During the same month, the freight charges on less-than-carload furniture shipped to New York and Philadelphia varied from 4.8 to 9 percent of the invoice value of the traffic.

The classification and the exceptions provide for less-than-carload ratings on 367 items of furniture. Of these, the suspended schedules would increase the ratings on 151, identical ratings being provided in both the classification and the exceptions for the remaining 216 items. The articles on which the increases would apply move in relatively large volume and the changes in ratings do not fully reveal the changes in actual rates that would be brought about by the suspended schedules. Due to the requirements of the class rate revision of 1939, exceptions-rated traffic transported within official territory is subject to basic class rates 10 percent lower than the scale applicable on classification-rated traffic, while the reverse of this is true on interterritorial movements to and from official territory. On such movements, exceptions-rated traffic is in most in-

stances subject to rates 10 percent higher than those on classification-rated traffic. It follows, therefore, that on traffic rated first class in both the classification and the exceptions, the suspended schedules would increase the rates within official territory by 10 percent and reduce many of those to and from that territory by the same percentage.

The less-than-carload ratings prescribed in *Furniture supra*, the present classification ratings, which are those proposed for the future, and the presently-applicable exceptions ratings, together with the average weights per cubic foot, on several articles of furniture, are shown in the following table, compiled from the respondents' exhibits of record:

RATINGS

Article	Average weight per cubic foot Pounds	Prescribed in *Furniture*, 177 I. C. C. 5	Under Present classification	Under exceptions
Beds, knocked down	7.68	1¼x1	1	2
Benches, set up	3.43	2½x1	1	1
Buffets, set up	6.08	1½x1	1	1
Chests, set up	6.23	1½x1	1	1
Chairs, set up	4.03	2 x1	1¾x1	1
Sofas, set up	3.86	2 x1	1½x1	1
Cots, folded	4.58	2 x1	1¼x1	1
Desks, steel, set up	8.10	1¼x1	1	2
Tables, steel, set up	4.59	2 x1	1¼x1	2
Mattresses, set up	4.00	2 x1	1½x1	1

According to the protestants, the average weights per cubic foot, or the weight densities, of the several articles are not accurately disclosed by the figures shown because they do not reflect representative movements. For example, the weight density shown for buffets was determined by the weights and measurements of 17 pieces made by 16 manufacturers, whereas there are more than 600 producers of buffets in the United States. As has been seen, a large percentage of the total movement of furniture in less than carloads is transported by truck. In any event, a lack of accuracy in the figures relating to weight densities would not seriously impair the value of the comparisons because (1) the present classification ratings are materially lower than those prescribed in *Furniture, supra*, for practically

all weight groups, and (2) the exceptions ratings which would be affected by the suspended schedules were largely determined without regard to weight density.

The respondents insist that most of the more desirable articles of furniture are now being transported by truck, largely by motor carriers specializing in the transportation of furniture. They claim that the furniture transported by rail within and to and from official territory consists of small shipments made up of light, bulky, fragile articles which are extremely difficult to transport without serious damage.

To develop pertinent transportation characteristics of less-than-carload furniture shipments, the respondents made a study of all less-than-carload furniture traffic received by each one of the 10 carriers listed in the footnote [7] during one day in August 1949. Some of the results of the study are shown in the table below:

Origin territory	Number of shipments	Average weight per shipment Pounds	Average revenue per shipment	Weighted average haul in official territory Miles	Average revenue accruing to official-territory carriers
Official	1,333	243	$ 4.60	385	$ 4.60
Southern	253	271	7.33	300	3.06
Western trunkline	7	153	4.45	394	2.34
Southwestern	3	223	14.06	794	4.96

All of the above figures relate to shipments on which the suspended schedules would increase the ratings. The revenue figures reflect the rates in effect in August 1949, and do not include the general increases which became effective on September 1 of that year. It will be noted that the average weight of the shipments was less than 300 pounds and the weighted-average haul more than 300 miles.

According to the respondents, furniture, especially that

[7] The Baltimore and Ohio Railroad Company; Boston and Maine Railroad; The Chesapeake and Ohio Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Grand Trunk Western Railroad Company; The New York Central Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company; and Reading Company.

handled by rail carriers in official territory is more susceptible to damage in transit than any other commodity moving in volume in less-than-carload service. On February 1, 1948, the respondents established new rules, much more stringent than those in force prior thereto, to govern the packing of furniture for shipment. The new rules resulted in some reductions in the volume of damage claims, but it appears that less-than-carload furniture shipments are still subject to important claims for damage in transit.

During August 1949, the carriers listed in the footnote collected $12,476,030 on all less-than-carload shipments, and their total claim payments on all such shipments aggregated $898,820, or 7.2 percent of the revenue on all less-than-carload traffic. During the same month, their total claim payments on less-carload furniture aggregated $207,620, or 23.1 percent of the total claim payments on all less-than-carload traffic and 1.7 percent of the total revenue on all less-than-carload shipments.

Respondents made a special study of damage to less-than-carload furniture at New York and Philadelphia during the two weeks beginning with October 17, 1949. The study was made by respondents' regular damage inspectors, in the course of routine inspections, for the purpose of obtaining the actual weight, invoice value, freight charges, and the estimated damage of each shipment. The study included 294 shipments, of which 252 originated in official territory, 141 in the South, and one in the West. Pertinent data from the study are shown in the following table.

	Data developed by inspections at New York, N. Y.	Philadelphia, Pa.
Total invoice value	$24,293.29	$22,576.35
Total freight charges	1,854.67	1,381.21
Total estimated damage	2,001.40	2,932.45
Percentage relation—damage to invoice value	8.24	12.99
Percentage relation—damage to freight charges	107.91	212.31

The figures do not pertain to all furniture shipments inspected during the study period. They relate only to those shipments on which the invoice value and freight bill information were available at the time of inspection. The damage figures reflect conservative estimates. The evidence

suggests that the actual claim payments will probably exceed the estimated damages.

The claim payments for visible and concealed damage on all less-than-carload traffic and less-than-carload furniture assumed by (a) all class I carriers and (b) the 10 official-territory carriers listed in the footnote during the period 1944-1948 were as follows:

Year	All class I carriers		Official-territory carriers	
	All less-than carload traffic	Less-than-carload furniture	All less-than carload traffic	Less-than-carload furniture
1944	$12,749,701	$3,457,288	$6,513,119	$1,624,543
1945	16,067,283	4,355,922	8,352,011	1,947,104
1946	19,976,113	5,004,024	[a]9,603,084	[a]2,310,471
1947	27,776,239	8,171,436	13,862,922	3,792,977
1948	26,373,562	8,249,160	12,171,447	3,721,203

[a] Payments by the Delaware, Lackawanna & Western were not included for the period July to December 1946.

The above amounts do not include payments for damages caused by theft, wreck, fire, and carrier negligence. The percentage relationships of damage claim payments on less-than-carload furniture to the total damage payments on all less-than-carload traffic during the same period are shown below:

For the year	For all class I carriers Per cent	For the 10 official-territory carriers Per cent
1944	27.1	24.9
1945	27.1	23.3
1946	25.2	24.1
1947	29.4	27.4
1948	31.3	30.6

On traffic originating on and after January 1, 1948, the claims paid by the Pennsylvania during the first 9 months of 1949 for visible and concealed damages on less-than-carload furniture were 30.8 percent of similar claims paid by the same carrier during the same period on all less-than-carload traffic. With the exception of shipments originating during January, this computation relates to furniture packed after the revised packing requirements became effective. The fact that this percentage is a trifle higher than the corresponding figure for 1948 does not negative the

fact that the revised requirements brought about some improvement in the claims situation.

The respondents contend that the revenue accruing to them from both intraterritorial and interterritorial shipments of less-than-carload furniture is substantially less than the cost of the service. To support their contentions in this respect, they introduced evidence designed to show (a) that the revenue which they receive from all less-than-carload traffic is materially less than the cost of the service, and (b) that the cost of handling less-than-carload furniture is substantially greater than the average cost of handling all less-than-carload traffic.

For January 1949, the respondents show that the cost to the 10 carriers shown in the footnote, excluding the Chesapeake & Ohio, for handling all less-than-carload traffic was materially in excess of 70 percent of the first-class rates, or the weighted-average rate on all less-than-carload traffic within and to and from official territory in January 1949, the spreads between cost and revenue being much greater for the longer than for the shorter hauls. The study was based on a cost formula approved in previous decisions, a less-than-carload weight of 13,320 pounds, and a return of 6 percent. In 1948, the 9 carriers included in the study received 76.8 of the less-than-carload revenue accruing to all class I carriers in official territory.

The study is strongly supported by the decision in *Class Rate Investigation, 1939*, 262 I.C.C. 447, wherein the Commission found, at page 591:

> "Less-than-carload traffic, as a whole, is carried at a deficit in all territories, except possibly in the South."

On page 697 of the same report appears this statement:

> "The railroads generally load and unload less-than-carload traffic * * *. One of the results of this method of handling less-than-carload shipments, however, is to mix freight of different classes in the same railroad car for transportation purposes, so that the costs are generally a composite of all classes of less-than-carload freight rather than a separately ascertainable figure for each commodity. The weighted-average rate is, therefore, the best criterion for judging

the sufficiency of the less-than-carload rates in the light of the costs. Such an analysis unmistakably reveals the fact that less-than-carload traffic generally in all the territories is not bearing its proper share of the costs of transportation—in fact, excluding wartime loading it is not yielding on the average, its out-of-pocket costs plus constant expenses solely related to this traffic, plus the cost of collection and delivery, in any territory except possibly in the southern where the margin of difference between revenues and these expenses is slight."

Respondents' contention that the cost of transporting furniture is substantially higher than the cost of transporting less-than-carload traffic as a whole is based to a large extent upon the light and bulky character of the traffic. Due to these characteristics, a shipment of furniture weighing very little occupies a large amount of space, and a capacity load of furniture placed on hand trucks or mechanized freight-moving equipment on station platforms, on delivery trucks, or in freight cars weighs substantially less than similar loads of the heavier-density articles which move in less-than-carload service. Since the expense of operating a unit of station equipment is practically constant, the cost per unit of weight of handling furniture is substantially higher than the cost of handling heavier and less bulky articles. The results of a study of station handling costs at several Pennsylvania Railroad stations prior to September 1, 1949, are shown below:

	Number of Shipments	Weight Pounds	Cost per net ton of handling less-than-carload furniture	Average cost per net ton of handling less-than-carload traffic as a whole
Williamsport, Pa.	5	3,926	$3.13	$1.44
South Philadelphia, Pa.	5	4,945	2.11	1.35
Harrisburg, Pa.	5	5,564	2.81	1.68
Pitcairn Transfer, Pa.	5	8,460	3.48	1.59
Pittsburgh (11th St.), Pa.	5	1,265	1.74	1.61
Buffalo, N. Y.	5	1,347	1.14	.94
Chicago, Ill.				
Originated traffic	5	2,434	4.64	2.27
Terminated traffic	5	3,364	4.38	2.27
Transfer traffic	5	2,826	4.15	2.27

The traffic study of August 1949, made by the respondents, to which reference has been made, includes 1,333 intra-territorial shipments of furniture terminated by the carriers shown in the footnote. Of these, the respondents selected 133 shipments as representative of the traffic in question for the subject of a study designed to show the cost of transporting less-than-carload furniture in official territory. To illustrate, on a shipment of chairs, weighing 320 pounds, from Cincinnati, Ohio to Alton, Ill., 339 miles, the following costs were developed: Allowance in lieu of collection or pick-up service, 16 cents; origin platform service, 29 cents; origin clerical service, 32 cents; delivery service, 46 cents; destination platform service, 23 cents; destination clerical service, 62 cents; line-haul service, $2.32; claim payments, $1.67; total cost, $6.07. The revenue collected was $5.57, the cost exceeding the revenue by 50 cents. On the basis of similar data relating to the remaining 132 shipments, the costs are shown as 113 percent of the revenues. Another study relating to 23 shipments from southern and western trunk-line territories to official territory, limited to costs assumed and revenues received by the official-territory carriers, indicates that the respondents' expenses were about 111 percent of their revenues from those shipments.

All cost items included in the studies, except claim payments, are based on the averages for less-than-carload traffic as a whole and do not reflect the actual cost of handling light and bulky furniture. The cost elements do not include the increases resulting from the 40-hour week which became effective on September 1, 1949, and the revenue figures do not include the general increases in rates which became effective on the same date. Under the general rate increase, respondents' rates were increased by about 4 percent, while the 40-hour week increased the less-than-carload terminal expenses of the Pennsylvania and the Baltimore & Ohio by 17 and 16.2 percent, respectively. The costs are also understated because nothing was included for station maintenance, general supervision, overhead and administrative expenses, terminal switching, and interest on investment in terminal facilities.

The costs for claim payments are based upon 73.5 percent of the claim cost incurred by the Pennsylvania for each one dollar of revenue received by that carrier on less-than-carload furniture during March 1949. Free pick-up and delivery service is not maintained at all stations in official territory, especially in New England. However, free pick-up and delivery service is maintained at practically all of the large stations in this territory and the cost of that service was charged only against those shipments included in the study upon which pick-up and delivery service was actually performed. The protestants insist that the cost of the pick-up and delivery service is not a proper element of expense because the respondents may discontinue the service or establish a special charge for performing it. The respondents probably could not be required to perform this service, but the shippers use it and the expense involved in its performance contributes to the overall cost of transporting the traffic.

Most of the evidence presented by the respondents is criticized by the protestants on the grounds that it is not representative of the situation because it relates (a) to the operations of only a few carriers, and (b) to only a limited number of furniture items. Most of the respondents' evidence pertains to furniture that is representative of the movement by rail and to the performances of the 10 carriers listed in the footnote. They are the largest carriers serving official territory and they terminate or originate most of the traffic.

The protestants contend that it is unsound to rate furniture, which has a wide range in densities and values, in accordance with any graduated density table, because the densities and values overlap, and that the ratings should be determined according to whether the furniture is set-up or knocked-down as is reflected in the existing exceptions ratings. Weight density is an important factor in the construction of ratings because of its close relation to space occupancy. The protestants point out that the respondents' merchandise cars are transported partly empty, irrespective of whether the partial load consists of heavy-density traffic or light-density furniture. Fragile, light-density

traffic is frequently the cause for the movement of partly-loaded merchandise cars. Protestants' position is tantamount to a contention that commodity rates should apply on this traffic, which is contrary to the decision of the Commission in *Furniture, supra.*

Generally, the carriers serving the territories bordering on official territory are not parties to the suspended schedules. It follows that the suspended schedules would not increase the ratings from border points to certain destinations, and the protestants contend that this would result in undue prejudice and preference. For example, the exceptions ratings would be continued from producing points such as Chicago and Rockford, Ill., to certain destinations, while producers at such points as Grand Rapids, Mich., and Jamestown, N. Y., would be required to pay the higher classification ratings. If the suspended schedules should become effective the producers in official territory would be compelled to ship into southern, western trunk-line, and southwestern territories on the classification basis, while producers within those territories may ship to the same points on the lower exceptions basis. The protestants maintain that this would result in undue prejudice and preference. A difference in rates, or ratings, standing by itself, is not enough to establish undue prejudice and preference. There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice.

On exceptions, protestants direct attention to the fact that certain respondents, especially those operating in Illinois, proposed cancellation of the exceptions ratings between all points in official territory, but did not propose cancellation of such ratings from and to all points on their lines in other territories, alleging that this would bring about departures from the fourth section. It appears that the respondents intended to cancel the exceptions ratings to and from all points on their lines, and after service of the proposed report additional schedules were filed proposing cancellation of some or all of the ratings referred to. These schedules were suspended in Investigation and Suspension

docket No. 5832 and will be disposed of by our decision herein.

The protestants also contend that the substantial increases in the spreads between the less-than-carload and the carload rates, which would be brought about if the suspended schedules became effective, would unduly prejudice small shippers and unduly prefer large shippers who ship in carload quantities. The record does not support this contention. The conclusion is warranted that no unreasonable relation to carload rates would result.

According to the protestants, the revised packing rules increased the cost of preparing furniture for shipment by about 26 percent, while the weight of the shipments, on which the freight charges are based, was increased by 10.8 percent. They assert that the additional revenue accruing to the respondents from the increase in shipping weights is more than enough to cover the cost of claim payments on the traffic. They state that they agreed to the revised packing rules and cooperated in their establishment with the implied understanding that there would then be no increases in the exceptions ratings.

As has been noted, a substantial portion of this traffic is handled by trucks. The protestants insist that practically all of the traffic now handled by the respondents will be diverted to motor carriers if the suspended schedules become effective. The packing requirements of the motor carriers are not as exacting as those of the rail carriers. In fact, some of the motor carriers, especially those specializing in the transportation of furniture, accept shipments without any packing or crating at all.

It is indicated that the furniture industry is not confronted with a seller's market. The protestants contend that it cannot absorb substantial increases in transportation charges. The suspended schedules would increase the rates per 100 pounds from 5.9 to 100 percent, the average increase being between 58.7 and 76.3 percent. The increases would be imposed upon rates that have been subjected to all the general increases authorized during and after 1946, and the protestants are fearful lest outstanding

findings in the class-rate revision of 1939 result in further increases in the ratings and the class rates.

Conclusions.—The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra,* and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice.

We find that the suspended schedules are just and reasonable, and not otherwise unlawful. An order will be entered vacating the orders of suspension and discontinuing the proceedings.

ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office in Washington, D. C., on the 20th Day of November, A. D. 1950

INVESTIGATION AND SUSPENSION DOCKET No. 5677
FURNITURE, L.C.L. FROM, TO AND BETWEEN THE EAST

INVESTIGATION AND SUSPENSION DOCKET No. 5694
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

INVESTIGATION AND SUSPENSION DOCKET No. 5832
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

It appearing, That by orders dated July 14, 1949, and later dates, the Commission entered upon an investigation concerning the lawfulness of the ratings, rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until February 14, 1950, and later dates, and that respondents subsequently postponed operation of the said schedules pending the disposition of the proceedings;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and has found that the suspended schedules are just and reasonable:

It is ordered, That the orders heretofore entered in this proceeding, suspending the operation of said schedules, be, and they are hereby, vacated and set aside as of December 11, 1950, and that these proceedings be discontinued.

By the Commission, division 3.

W. P. Bartel,
Secretary.

[SEAL.]

APPENDIX "B"

ORDER

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 16th Day of March, A. D. 1951

INVESTIGATION AND SUSPENSION DOCKET No. 5677
FURNITURE, L.C.L. FROM, TO AND BETWEEN THE EAST

INVESTIGATION AND SUSPENSION DOCKET No. 5694
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

INVESTIGATION AND SUSPENSION DOCKET No. 5832
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

It appearing, That on November 20, 1950, Division 3 made and filed its report, and entered its order in the above-entitled proceedings vacating and setting aside at a specified date the orders heretofore entered in these proceedings suspending the operation of the schedules therein involved and discontinued the proceedings.

It further appearing, That the (1) Furniture Manufacturers Association of Grand Rapids; (2) National Furniture Traffic Conference, Inc.; (3) Lynchburg Traffic Bureau; and (4) National Retail Dry Goods Association, filed peti-

tions for reopening, further hearing, reargument, and reconsideration, and that the effective date of the said order of November 20, 1950, was postponed until further order of the Commission pending consideration and disposition of said petitions;

It further appearing, That said petitions were assigned for oral argument and that the Commission, on February 26, 1951, heard oral argument by the parties upon such petitions;

And it further appearing, That the grounds set forth in said petitions, and at such oral argument, in support thereof, do not constitute good and sufficient cause to warrant reopening the proceedings for further hearing, reargument, and reconsideration;

It is ordered, That said petitions be, and they are hereby, denied;

It is further ordered, That the said order of November 20, 1950, as subsequently modified, be, and it is hereby, further modified so as to become effective April 10, 1951.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX "C"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., ET AL., *Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

Before Woodbury, Circuit Judge, and Sweeney and Ford, District Judges

OPINION OF THE COURT—September 5, 1951

WOODBURY, *Circuit Judge:*

In this suit under Chapter 157 of Title 28, U. S. C. to enjoin and set aside two orders of the Interstate Commerce Commission we are concerned with certain railroad rates on furniture, and related articles, moving in less than carload lots between points within Official and Illinois Territories,[8] and also to and from points within those territories and points in Southern,[9] Western Trunk Line,[10] and Southwestern Territories,[11] which the Commission in investiga-

[8] Illinois Territory is here treated in accordance with usual Commission practice as part of Official Territory, and Official Territory, generally speaking, lies east of the Mississippi and north of the Ohio and Potomac Rivers, and also includes most of Virginia.

[9] Southern Territory lies south of Official Territory and east of the Mississippi River.

[10] Western Trunk Line Territory is located approximately between Official Territory and the Rocky Mountains.

[11] Southwestern Territory lies south of Western Trunk Line Territory and west of the Mississippi River and also includes Arkansas, Texas, Oklahoma, and part of Louisiana. See *New York* v. *United States,* 331 U. S. 284, 291.

Another territory, Mountain Pacific, which includes Montana, New Mexico, and all territory west of the Rocky Mountains, is not involved in this proceeding.

tion and suspension proceedings found, "just and reasonable, and not otherwise unlawful." Two kinds of rates are here involved; Class rates, and Exception rates. Class rates rest upon a grouping of commodities by the railroads into classes, the commodities in each class paying the same rate per 100 pounds. One class is called first class, and the others are either a percentage or a multiple of first class. Thus freight classifications consist of lists containing descriptions of every commodity moving by freight, and the class, or perhaps classes, to which it is assigned, that is to say, its classification rating or ratings. Class rates, as described in footnote 2 on page 290 of the opinion in *New York* v. *United States*, cited in footnote 4, *supra*, "are in the form of a schedule which shows the price per 100 pounds for moving first-class freight every possible distance it may be moved. The cost of shipment for a given commodity is determined by ascertaining its classification rating, the first-class rate per 100 pounds for the haul involved, and the percentage of the first-class rate to which the classification rating in question is subject." Exception rates, as the name implies, result from the transfer of a commodity out of its regularly assigned class into another. See footnote 3, *id.*

In 1926 the Interstate Commerce Commission initiated a general nation-wide investigation of railroad freight rates on furniture, and related articles, which terminated in 1931 in a decision and order establishing class rates for the commodities considered. *Furniture*, 177 I. C. C. 5. These class rates, however, had hardly gone into effect when the railroads in 1932 at the behest of shippers established exception rates for some 151 furniture items when moving in less than carload lots. This action was taken for the twofold purpose of meeting then unregulated motor-carrier competition and to give financial assistance to the furniture industry during the depression. These exception rates, with modifications, have remained in effect ever since. Their abolition, with consequent automatic return to the class rates of 1931, which have twice been revised downward, is the matter with which we are concerned.

The principal rail carriers operating in Official Territory, as that term is used herein, by filing schedules with

the Commission which were to become effective on July 15, 1949, and on later dates, proposed cancellation of their exception rates on furniture moving in less than carload lots within the above territory, and to and from points in it and points in Southern, Western Trunk Line, and Southwestern Territories. Various individual shippers concerned, and organizations representing the furniture industry in the territories involved, protested to the Commission, and it, exercising the power conferred upon it by § 15(7) of Part I of the Interstate Commerce Act (49 U. S. C. § 15(7)) suspended the schedules until February 14, 1950, and later dates. Subsequently the schedules were voluntarily suspended by the railroads pending disposition of the Commission Proceeding.

Extended hearings were held in November, 1949, before an examiner for the Commission who, after submission of briefs, issued a proposed report which concluded with the recommendation:

> "The Commission should find that the suspended schedules are just and reasonable. An order should be entered vacating the orders of suspension and discontinuing these proceedings."

The shipper-protestants filed exceptions to this proposed report, the railroad-respondents replied, and oral argument followed before Division 3 of the Commission, which on November 20, 1950, entered a decision endorsing the examiner's recommendations. *Investigation and Suspension Docket No. 5677, Furniture Less Than Carload, From, To, and Between The East*, 279 I. C. C. 509. As its conclusions the Division said:

> "The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra* [12] and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the excep-

[12] 177 I.C.C. 5.

tions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice.

"We find that the suspended schedules are just and reasonable, and not otherwise unlawful. An order will be entered vacating the orders of suspension and discontinuing the proceedings."

An order was accordingly entered on the same day vacating the suspension of the proposed schedules as of December 11, 1950, and the shippers thereupon filed petitions for reconsideration and further hearing by the entire Commission. The railroads' proposed schedules were further suspended pending consideration of these petitions, which were denied on March 16, 1951. Thereafter by successive orders the effective date of the order of November 20, 1950, was extended to April 25, 1951.

In the meantime on April 9, 1951, the plaintiff, National Furniture Traffic Conference, Inc., a Massachusetts Corporation having its principal office in the City of Gardner in that Commonwealth, filed its complaint in this court against the United States and the Interstate Commerce Commission asking for both a temporary and a permanent injunction restraining and suspending the operation and execution of the Commission's November 20, 1950 order putting the schedules proposed by the railroads into effect, and also its March 16, 1951 order denying the protestants' petitions for reconsideration and for further hearing by the entire Commission. This special three-judge court was thereupon duly convened pursuant to Title 28 U. S. C. § 2284 to hear the complaint. Our jurisdiction in the premises under Title 28 U. S. C. § 1336 is obvious.

The Furniture Manufacturers' Association of Grand Rapids, Michigan, a non-profit corporation of that State organized to promote and develop the furniture industry in Western Michigan, was granted leave to intervene as a

party plaintiff, and the Pennsylvania Railroad Company, and the other carriers by railroad in Official Territory who had been respondents in the Commission's proceedings, were granted leave to intervene as parties defendant. All parties have filed appropriate pleadings, and most of them have also filed briefs.

Judge Ford of this court on April 17, 1951, issued a temporary restraining order, and on April 27, 1951, the full court heard the parties on affidavits, briefs and oral arguments on the plaintiffs' application for an interlocutory injunction. A majority of this court as then constituted, (Judge McCarthy sat at the hearing on the application for a temporary injunction but was prevented by illness from sitting at the hearing on the application for a permanent injunction) denied interlocutory relief on the condition, which was complied with, that the railroad intervenors agree in writing, as they had orally at the hearing, to repay the shippers any freight charges which might subsequently be found to have been unlawfully collected. Judge Ford's temporary restraining order was thereupon revoked. The plaintiff, National Furniture Traffic Conference, Inc., then moved for summary judgment under Rule 56, F. R. C. P., and on June 8, last, the case came on for final hearing on that motion and on the application for a permanent injunction. The hearing was on the record before the Commission, which was introduced in evidence, affidavits, briefs and oral argument.

The motion for summary judgment is grounded upon the proposition that cancellation of the exception rates as proposed by the railroads would necessarily have the effect of restoring class rates on a variety of non-furniture items which were not considered in the 1931 *Furniture* case and as to the transportation characteristics of which no evidence was introduced and no findings were made by the Commission in the instant proceeding. It is said, to go into more detail, that the exception rates involved covered not only furniture, but also altogether different types of merchandise, such as clothes baskets or hampers, and store display racks and stands, classified specifically as such in the railroad classification ratings, and also baby and doll

carriages, gocarts and children's sulkies, classified by the railroads in their tariffs as "vehicles, other than motor", that although the classification ratings on furniture were approved by the Commission in its 1931 proceeding, the ratings on these other items were not because they appeared under other headings in the railroad lists, and that the record before the Commission in the proceeding here under consideration contained no evidence whatsoever with respect to the justness or reasonableness of the proposed classification ratings of the non-furniture items mentioned above. Wherefore it is contended that the Commission's order of November 20, 1950, is obviously arbitrary and capricious, and therefore bad in its entirety, and should be summarily set aside and enjoined.

It is strenuously urged that a motion for summary judgment is wholly inappropriate in cases such as this. But however this may be, it is certainly true that a summary judgment enjoining enforcement of an order of the Interstate Commerce Commission would be entered only in the clearest of cases, and this is definitely not in that category. Indeed it appears that the non-furniture items mentioned above were included in the exception rates of 1932 which the railroads now wish to cancel because of the insistence of spokesmen for the shippers that those items had the same transportation characteristics as furniture. And moreover, the railroads did put into the record statistical matter with respect to the non-furniture items showing their similarity to furniture as far as transportation is concerned. It is true that the Commission made no specific subsidiary findings with respect to the non-furniture items, but in our view that is not necessarily fatal to the order as will appear from our discussion to follow. For the present it will suffice to say that we see no merit in the motion for summary judgment and that it will be denied.

The basic contentions of both plaintiffs center around the Commission's ultimate conclusion that the proposed schedules of the railroads cancelling their exception rates, and thereby automatically restoring the class rates of 1931, as revised, "are just and reasonable, and not otherwise unlawful". They say, speaking broadly, that the ultimate con-

clusion reached by the Commission is not buttressed by adequate subsidiary findings, and that subsidiary findings in support of the ultimate conclusion, had they been made, would have had no support in the record. We cannot agree.

It is true, as the plaintiffs urge in their brief, that an order of the Commission is not valid unless the ultimate finding upon which it rests is supported by adequate subsidiary findings which in turn rest upon substantial evidence in the record. The rule is clearly stated and fully discussed, and the leading cases which established it are cited in *N. Y. C. RR. Co. et al.* v. *U. S. and I. C. C.*, decided in this District by a court such as this on June 30, last.

Paraphrasing the summation of the rule with respect to the adequacy of Commission findings as stated in the case last cited it will suffice to say here that the report of the Commission must contain sufficient basic or subsidiary findings of fact, (which ought to be clearly stated and identified as such so that a reviewing court will not be groping in the dark for the grounds of the Commission's ultimate conclusion) to warrant the reviewing court in concluding that the Commission had rational grounds for refusing to find, as the case might be, (1) that the proposed schedules are "just and reasonable," within the meaning of § 1(5) of the Act, or (2), are free of "unjust discrimination" prohibited by § 3, or (3), contain no undue or unreasonable preference, prejudice or disadvantage within the prohibitions of § 3(1).

An examination of the Commission's report in the instant case shows that it lived up to the rule. Well over a dozen subsidiary findings were made covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture i. e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic. No useful purpose will be served by a detailed recapitulation of all the findings, for they are to be found in the published report of the Commission cited above. It is true that no findings were made with respect to

the non-furniture items, such as clothes baskets and children's vehicles enumerated above, and that no specific findings were made comparing furniture rates with rates on non-related but comparable commodities. But this is not fatal for the reason that it has long been the rule that typical or representative findings resting upon typical or representative evidence are all that is required, otherwise the administrative burden in cases like this would be so great that the Commission would be bogged down in a mass of detail and unable to function. See *New England Divisions Case*, U. S. 184, 197, et seq. Certainly to require a full scale comparison of rates on comparable commodities in every rate case would be to require the impossible. Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity, even though it may say nothing as to the rate scale at large. It will suffice to say that we find the subsidiary findings adequate to warrant our conclusion that the Commission had rational grounds for its conclusion that the schedules proposed by the railroads are "just and reasonable, and not otherwise unlawful", which last phrase we take to mean that the schedules are free of unjust discrimination prohibited by § 2 of the Act, and contain no undue or unreasonable preference, prejudice or disadvantage within the condemnation of § 3(1).

And it will also suffice to say that a careful examination of the voluminous record before the Commission discloses adequate evidence, although some of it is typical or representative to be sure, to support the subsidiary findings made. To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the "begat" chapters of the Book of Numbers. We content ourselves therefore with the general statement that a perusal of the record and a consideration of the arguments leaves us with the firm conviction that the Commission has not deviated from the rule stated earlier herein.

One further argument, however, with respect to the Com-

mission's report perhaps deserves brief mention. It is said that the Commission's ultimate finding or conclusion quoted above clearly shows on its face that the Commission itself was not convinced that the railroads had sustained their statutory burden of proof in the premises and, indeed, that it was convinced that the evidence did not support its ultimate conclusion. It is true that the Commission did not state its conclusion in terms of complete assurance. It said that the evidence as to the railroads' costs was "not conclusive" but added that it gave rise to "serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service", and it said that the record was "not persuasive" that the proposed ratings would subject any shippers to undue prejudice.

The failure of the Commission to speak with full conviction is not fatal, however. The process of rate making involves the weighing of imponderables, the making of predictions as to future traffic, and presumptive reasoning from available data. It necessarily must proceed on the trial and error basis. We think the Commission was doing no more than realistically to face these facts when choosing the criticised phraseology, for terms of certainty would be only illusory. Who can tell in advance, for instance, how much traffic will move by rail and how much will be diverted to trucks by the higher rates?

The remaining arguments of the plaintiffs have been considered, but we see no occasion to consider each one or even to enumerate them. It will be enough to say that none of them persuade us that there is any basic infirmity in the action taken by the Commission, and that if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materalizes, remedial process is readily at hand under the Act.

The plaintiffs have voluntarily abandoned their contention that the second order of the Commission complained of (that of March 16, 1951, denying reopening and reconsideration by the entire Commission) violated the Administrative Procedure Act.

The Interstate Commerce Commission and it alone, advanced the proposition that the plaintiffs have no standing

to sue. The contention was not pressed at oral argument, however, and we feel that we can brush it aside with the comment that in our opinion it has no merit.

A judgment will be entered denying the motion for summary judgment and dismissing the complaint.

APPENDIX "D"

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 51-353 Civil Action

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., ET AL., *Plaintiffs*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

JUDGMENT OF DISMISSAL

WOODBURY, Circuit Judge, SWEENEY, Chief District Judge, and FORD, District Judge

In accordance with the opinion of the Court handed down on September 5, 1951 in the above entitled action, it is

ORDERED that the plaintiff's motion for summary judgment be and it is hereby denied and the complaint dismissed with costs taxed at $

By the Court,

(S.) HELEN I. TWEEDY,
Deputy Clerk.

Approved:

(S.) PETER WOODBURY
(S.) GEORGE C. SWEENEY
(S.) FRANCIS JW FORD

Judgment entered September 11, 1951.

JOHN A. CANAVAN,
Clerk,

by (S.) HELEN I. TWEEDY,
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-APPELLEE

MOTION TO AFFIRM

[Filed November 23, 1951]

Pursuant to Rules 7, paragraph 4, and 12, paragraph 3 of the Revised Rules of the Supreme Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered on September 11, 1951, of a specially constituted three-judge United States District Court pursuant to 28 U.S.C. 1253, 2284 and 2325, denying a motion for summary judgment and dismissing a complaint to set aside orders of the Interstate Commerce Commission. Appeal was allowed

and appeal papers were served on November 9, 1951.

The orders of the Commission complained of were entered in three Investigation and Suspension proceedings under Section 15 (7) of the Interstate Commerce Act, 49 U.S.C. 15 (7).[1] The proceedings began with the suspension, under Section 15 (7), by Division 3 of the Commission, of tariff schedules filed by railroads in Official Territory in June 1949 to become effective on July 15, 1949. These schedules authorized the concellation of exceptions ratings[2] on furniture and related articles shipped by railroads in less-than-carload quantities from and to points within Official Territory and Illinois Territory, and between each of those territories and other classification territories.[3] If it had not been for their

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[1] 279 I.C.C. 509. The proceedings were entitled I & S Docket No. 5677—Furniture, L.C.L., From, to and Between the East; I & S Docket No. 5694—Furniture, L.C.L., From or to Illinois Territory; and I & S, Docket No. 5832—Furniture, L.C.L., From or to Illinois Territory.

[2] The distinction between class rates and exceptions rates is described in the opinion of this Court in *New York* v. *United States*, 331 U.S. 284, 291, n. 4, and in the opinion of the court below.

[3] Classification territories in the United States are as follows: Official Territory may be said roughly to include that part of the United States north of the Potomac and Ohio rivers and east of the Mississippi River. Illinois Territory, as the names indicates, lies largely within the State of Illinois. Southern Territory, generally, lies south of the Ohio and Potomac rivers and east of the Mississippi River. Western Territory, generally, includes that part of the United States west of the Mississippi River.

suspension, existing classification ratings would have become effective on this traffic July 15, 1949. The classification ratings provide higher rates on 151 of the items of less-than-carload furniture and related articles than were provided by the exceptions ratings. The total number of items of furniture and related articles covered by the classification ratings in question are 367.[4]

The order here involved is that of Division 3 of the Commission, which vacated the suspension of these schedules and thus caused the classification ratings and higher class rates to apply to 151 of the 367 items of less-than-carload furniture and related articles referred to above.[5] The reasoning of Division 3 in arriving at the challenged order is fully set forth in its report, which is attached to the jurisdictional statement as Appendix A. Appellant charged in its complaint that classification ratings were unreasonable in violation of 49 U.S.C. 1 (5), were unduly discriminatory in violation of 49 U.S.C. 2 and were unduly prejudicial to shippers and areas in Official and Illinois territories and unduly preferential of shippers and areas in

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[4] "Related articles" largely include children's vehicles, such as velocipedes and doll carriages, baby carriages, clothes' hampers and store display racks. Railroads operating in other than Official and Illinois territories did not file tariffs authorizing the cancellation of the exceptions ratings.

[5] The second order complained of in the district court was that of the full Commission denying the petition of appellant for reconsideration of and rehearing on the first order. Error is not assigned to the refusal of the district court to set aside this order.

other classification territories, in violation of 49 U.S.C. 3 (1). The charge that classification ratings were unreasonable was largely based upon the contention that the rates provided were unduly high. The charge that these ratings were unduly discriminatory was based upon the contention that items of furniture having the same transportation characteristics and then moving on the same rates would, under the classification ratings, be assigned different rates. The charge that the classification ratings would be unduly prejudicial to shippers and areas in Official and Illinois territories and unduly preferential in favor of shippers and areas in other classification territories was based on the failure of railroads in Southern and Western territories to publish or concur in tariff schedules authorizing the cancellation of the exceptions ratings.

Appellant now assigns as error the district court's findings, conclusions and rulings that the ultimate finding of Division 3 of the Commission that the classification ratings are just and reasonable and not otherwise unlawful, was adequately supported by subordinate findings and by substantial evidence. In its statement as to the substantiality of the questions presented, appellant broadly charges that the court below has abdicated its function of judicial review, and stresses the importance of the furniture industry and the im-

portance of the rates here involved to that industry.

We submit that the judgment of the district court is well considered and correct. It was entered in a proceeding to review the order of an administrative body in a specialized and technical matter entrusted to that body by Congress. The Commission is expected to bring to matters before it the benefit of its experience, special knowledge and informed judgment. This is the heart of the administrative function in the quasi-legislative process of railroad rate making. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 536. The Commission must, of course, act within the Constitution and its statutory authority. It must hold full and fair hearings; its orders must adequately explain the basis for its conclusions so that interested parties and reviewing courts may know why it acted as it did; its conclusions must have rational and substantial support; and it may not act capriciously or arbitrarily. But within those bounds, all findings of fact and all conclusions on mixed matters of law and fact are to be finally made by the Commission. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U.S. 541, 547-8. In reviewing an administrative order, the court may not properly be asked to rehear the matter or to substitute its judgment for that of the Commission. The court may not be asked to reach its own conclusion on the issue pre-

sented to the Commission. The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Hanna Furnace Corp.* v. *United States*, 53 F. Supp. 341, affirmed 323 U.S. 607; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286. This is the meaning and substance of the doctrine of administrative finality. The importance of the industry or the rates involved obviously does not require a different standard of review to be applied to the decision of the expert administrative body charged with rate making.

The rule of administrative finality has peculiar application to decisions of the Commission under 49 U.S.C. 1 (5), 2 and 3 (1). It was so held in *Board of Trade of Kansas City* v. *United States*, *supra*, at page 546:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * * and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481; see *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262

U.S. 318, 322; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53.

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 581-82.

Appellant had full access to and the full benefit of the administrative process provided by law. The Commission was not required by 49 U.S.C. 15 (7) to suspend the tariff schedules filed by railroads in Official Territory. It exercised its discretion in doing so. Thereafter, the Commission initiated and conducted a full investigation, and conducted a hearing before an examiner over a four-day period. The transcript of the hearing covers 711 pages and 95 exhibits were offered by the parties. The Hearing Examiner before whom the hearing was held duly made his proposed report and appellant filed extensive exceptions thereto. Division 3 heard argument on these exceptions and, after its decision was rendered and its order was made, appellant petitioned the Commission for further hearing and reconsideration. The Commission heard argument on this petition and

denied it on the ground that no good cause existed for reopening the proceedings for further hearing and reconsideration. As a result of these extended administrative proceedings, the effective date of the suspended schedules were progressively postponed to April 25, 1951. Thus, appellant enjoyed lower rates than those that Division 3 ultimately found were just and reasonable and not otherwise unlawful from July 15, 1949—the date when the suspended schedules would have become effective but for their suspension—to April 25, 1951.[6]

The Commission is not required to make detailed findings of fact except in actions to enforce its orders awarding damages. 49 U.S.C. 14 (1). It is enough that " 'the report read as a whole sufficiently expresses the conclusion of the Commission based upon supporting data' ". *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 227-228. That the district court applied this

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[6] It is significant that the rates ultimately prescribed are below the maximum basis found reasonable in a general furniture rate investigation from which this proceeding stemmed. *Furniture*, 177 I.C.C. 5. The Commission concluded:

"The exceptions ratings are far below the maximum basis prescribed in *Furniture*, *supra*, and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice."

test to the findings of Division 3 in the instant proceedings is clear. The court said:

> An examination of the Commission's report in the instant case shows that it lived up to the rule. Well over a dozen subsidiary findings were made covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture, i.e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic. No useful purpose will be served by a detailed recapitulation of all the findings, for they are to be found in the published report of the Commission cited above. It is true that no findings were made with respect to the non-furniture items, such as clothes baskets and children's vehicles, enumerated above, and that no specific findings were made comparing furniture rates with rates on non-related but comparable commodities. But this is not fatal for the reason that it has long been the rule that typical or representative findings resting upon typical or representative evidence are all that is required, otherwise the administrative burden in cases like this would be so great that the Commission would be bogged down in a mass of detail and unable to function. See *New England Divisions Case*, [261] U.S. 184,

> 197 et seq. Certainly to require a full scale comparison of rates on comparable commodities in every rate case would be to require the impossible. Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity, even though it may say nothing as to the rate scale at large.

It is likewise apparent that the district court considered the entire record in determining that the subordinate and ultimate findings of Division 3 were adequately supported by the evidence. The court said:

> And it will also suffice to say that a careful examination of the voluminous record before the Commission discloses adequate evidence, although some of it is typical or representative to be sure, to support the subsidiary findings made. To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the "begat" chapters of the Book of Numbers. We content ourselves therefore with the general statement that a perusal of the record and a consideration of the arguments leaves us with the firm conviction that the Commission has not deviated from the rule stated earlier herein.

Appellant actually adverts to but one question of law in its statement as to substantiality of questions presented. The court below held that:

> if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materializes, remedial process is readily at hand under the Act.

Appellant asserts that this is error, and that "later collateral attack upon such ratings by an individual shipper would be precluded" citing *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 381. But that principle is applicable to rates *prescribed* by the Commission, not to carrier proposed rates which the Commission declines to set aside. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 685-7. Appellant seeks to distinguish the *Inland Waterways* case on the ground that there the Commission had not found the rates to be just and reasonable and not otherwise unlawful. But this Court's opinion in that case shows the contrary to be the fact. This Court noted that (319 U.S. at 685)

> the Commission stated that the railroads "are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic," and found that "the proposed schedules are shown to be just and reasonable".

and also that the Commission had found that (*id.* at 686) "the proposed schedules 'are not shown to be otherwise unlawful' ". Nevertheless, the Court

held that the Commission's order did not constitute an approval or prescription of the rates involved. And subsequently those rates were in fact set aside in what appellant would regard as a "collateral attack." *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

EDWARD M. REIDY,
Associate Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1951.

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FILED
DEC 11 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF THE PENNSYLVANIA RAILROAD COMPANY ET AL., TO AFFIRM

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FRANCIS L. BROWN,
R. J. FLETCHER,
WILLIAM B. JOHNSON,
JOHN DICKINSON,
Counsel for Pennsylvania Railroad Company, et al., Appellees.

CHOATE, HALL & STEWART,
Of Counsel.

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Section 2 8
Section 3 8
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Section 14(1) 9
Section 15(1) 10
Section 15(7) 2

United States Code, Title 28:

Section 2284 1
Section 2325 1

1951, appellant made no application to the District Court for a stay of its order of September 11, 1951. The appeal was allowed on November 9, 1951.

The orders of the Interstate Commerce Commission, dated November 20, 1950, and March 16, 1951, were entered in three investigation and suspension proceedings, reported at 279 I. C. C. 509 and entitled "I. & S. 5677—*Furniture, L. C. L., From, to and Between the East;* I. & S. Docket No. 5694—*Furniture, L. C. L., From or to Illinois Territory;* and I. & S. Docket No. 5832—*Furniture, L. C. L., From or to Illinois Territory.*" The Commission proceedings arose out of the action of the principal railroads operating in Official Classification Territory[2] in filing certain tariff schedules in June, 1949, to become effective July 15, 1949. The Commission exercised its discretion under Section 15(7) of 49 U. S. C. A. to suspend the operation of those schedules and to institute an investigation into their lawfulness.

After hearing and submission of briefs, a proposed report was issued by the Hearing Examiner, recommending that the tariff schedules be permitted to become effective. Shipper protestants, including plaintiff-appellant, filed exceptions, which were orally argued before Division 3 of the Commission. The first order attacked by plaintiff is the order of Division 3, issued on November 20, 1950, providing that the suspension of the tariff schedules was vacated as of December 11, 1950, and the investigation discontinued.

Shipper petitions for further hearing and reconsidera-

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[2] In general, Official Classification Territory is that part of the United States lying east of the Mississippi River and north of the Ohio and Potomac Rivers. The railroads which were parties to the tariff schedules, and thus respondents in the Commission proceedings, included practically all railroads operating within that Territory. A few roads operating principally in other territories but to some extent in Official Territory are not parties to the tariff schedules.

tion by the entire Commission having been filed however, the proceedings were reargued before the entire Commission, which on March 16, 1951, issued its order denying the petitions and fixing April 10, 1951, as the date on which the tariffs should become effective.

A temporary restraining order issued by Judge Ford of the District Court on April 17, 1951, was revoked by the court, and plaintiff's application for an interlocutory injunction was denied, by order of May 3, 1951, issued after hearing the parties on affidavit and in oral argument. The tariff schedules accordingly became effective on May 8, 1951, and are presently in effect.

Background and Nature of the Proceedings

The principal facts clearly appear from the Commission's report and the District Court's opinion (Appendices A and C, respectively, to the Statement as to Jurisdiction; page references herein are to the appropriate pages in the Appendices to the printed Statement, rather than in the official Commission and Federal reports).

The tariff schedules before the Commission in this proceeding cancelled all *exceptions ratings* (which, where published, supersede the otherwise applicable classification ratings) on all items of furniture and related articles moving in less-carload service within, to or from Official Territory via the lines of respondent railroads. Such cancellation, when it became effective May 8, 1951, automatically made applicable on every such item the existing *classification rating* published for that particular item, the exceptional treatment having been discontinued by the cancelling tariffs.

The governing rating on any item of freight determines the percentage to be applied to the basic scale of class rates far various distances of haul, in order to ascertain the applicable freight rate per hundredweight on any movement of

that item. If an exceptions rating is published for any item, *it* is the governing rating, even though a considerably higher classification rating for the same item may at the same time be published in the "Classification" proper.

The classification rating of any item is intended to reflect the item's favorable and unfavorable transportation characteristics, or classification elements (cubic density, value per pound, susceptibility to loss or damage, etc.), which have a direct relation to cost and value of rail service. An exceptions rating is not based on the transportation merits or demerits of the item; it is published generally as a means of accomplishing a rail rate reduction in order to compete with motor or water carriers, or for similar reasons persuasive to railroad management in the formation of any exceptional pricing policy. *Class Rate Investigation, 1939*, 262 I. C. C. 447, 476-477, 508, 509. Since exceptions ratings are lower than the classification ratings on the same items, cancellation of the former automatically has the effect of raising the freight rates applicable to the affected items, even though no change occurs in the basic class rate scales or in published classification ratings.

There are—and were in 1949 when this proceeding began—some 367 items of less-carload furniture articles listed in the "Classification." Each of these has its classification rating reflecting its transportation characteristics. But, in 1949, 151 of those 367 items enjoyed reduced rates by reason of then existing exceptions ratings lower than their respective classification ratings. The remaining 216 items enjoyed no such concession—they moved under the same ratings as published for them, based on the characteristics of each item, in the "Classification" proper.[3]

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[3] In revenues, tons and number of shipments, about half the traffic moved under exceptions ratings lower than the comparable classification ratings. (Exhibit 15 before the Commission; Exhibit 1 before the District Court.)

Cancellation of all exceptions ratings therefore caused increased freight charges to be paid on 151 items, but not on the remaining 216. This was not the result of unequal or selective provisions in the tariff schedules effecting the cancellation. It was solely the result of the unequal nature of the exceptions ratings which plaintiff-appellant and other shipper representatives successfully urged upon the railroads in 1932.

The shipper representatives persistently argued in 1932 that reduced freight charges on furniture were essential (1) to prevent extensive traffic diversions from rail to truck transport (not then Federally regulated) and (2) to financially assist the depression-stricken furniture industry and thereby stimulate furniture production, marketing and traffic. For these two reasons the railroads exercised their managerial prerogative of publishing reduced exceptions ratings. When published, and until cancelled, they were always specially "flagged," or identified in the tariffs, as "motor-competitive" reductions.

The exceptions ratings requested by plaintiff-appellant in 1932, and published by the railroads in the same year, were of such pattern that they effected reductions for all items with classification ratings above a certain "line" but conferred no similar concession on any lower-rated items. Those above the line were 151 in number.

In 1933 and again in 1940 the railroads made general downward revisions in the published classification ratings, including those even then superseded by the motor-competitive exceptions ratings. Consequently, the classification ratings are now substantially below the basis of maximum reasonable ratings approved by the Commission in 1931, after a five-year nationwide investigation of furniture rates and ratings, in *Furniture*, 177 I.C.C. 5. Since the tariff schedules here involved became effective on May 8, 1951,

each of the 367 items has been subject to its regular classification rating, thereby restoring for every item a recognition of its classification elements.

The exceptions ratings were first published to expire in one year. The record before the Commission (Tr. 40-48) and the District Court (Exhibit 1) fully reveal the circumstances explaining the success of the furniture interests in holding these reduced competitive ratings year-after-year, even though they were constantly under criticism and their cancellation, or some half-measure, was repeatedly considered.

In the middle 1940s, less-carload deficits became a serious problem, particularly for the railroads in Official Territory. In 1945, in *Class Rate Investigation, 1939*, 264 I.C.C. 41, 66-67, the Commission admonished the railroads to

> "• • • give careful consideration to the rates maintained by them on less-than-carload traffic with a view to making readjustments in ratings or rates, as promptly as possible, which will insure that the rates on such traffic are on a compensatory level. *Traffic moving on exception*, column, and commodity *rates*, as well as pick-up and delivery services accorded less-than-carload traffic, *should be so studied.*" (Emphasis supplied.)

The Supreme Court, affirming the Commission decision, quoted the Commission's finding that less-carload traffic "was not bearing its proper share of the costs of transportation," *New York* v. *United States*, 331 U. S. 284, 333 (1947), with the further comment (p. 336) that

> "The past failure of this traffic, as a whole, to carry its proper share of the costs may well have been *due in large measure to the maintenance of exception and commodity rates.*" (Emphasis supplied.)

Substantial increases in certain depressed l.c.l. ratings and rates within Official Territory were proposed by the

Official Territory roads and approved by the Commission in I. & S. 5505 and 5502, *Less Than Carload Exceptions Ratings, Official Territory*, 269 I.C.C. 553 (1948), and I. & S. 5811, L.C.L. *Exceptions Class Rates—Official Territory* (not reported; the Commission declined to suspend operation of the schedules).

In *Increased Less-Than-Carload Rates in Official Territory*, 273 I.C.C. 57 (1948), the Commission disapproved a blanket increase in all l.c.l. class rates, and further admonished these carriers (p. 112):

> "*In removing the deficit resulting from less-than-carload operation, carriers should survey their less-than-carload rates and make increases where such rates are low and where the traffic can reasonably bear such an upward adjustment.* But we are not convinced on this record that there should be a blanket increase such as is here proposed in the class rates on all less-than-carload traffic." (Emphasis supplied.)

After carefully studying the entire l.c.l. rate structure and further examining the transportation and traffic characteristics of less-carload furniture, the traffic executives of Official Territory railroads concluded that under current cost and competitive conditions, particularly as distinguished from conditions in 1932, a special basis of motor-competitive exceptions ratings on this traffic was an unjustifiable departure from the regular classification basis. Accordingly, in May, 1948, the railroads announced a public hearing on cancellation of the exceptions ratings. The cancelling schedules were finally filed with the Commission in June, 1949.

The Commission suspended operation of the schedules for seven months under Section 15(7) of the Interstate Commerce Act (Title 49, U. S. Code). This exhausted the Commission's suspension power but, to permit time for full

hearing, briefs, the proposed report of the Hearing Examiner, exceptions to the proposed report, oral argument before Division 3 of the Commission, the report of Division 3, the filing of petitions for reconsideration and further hearing, oral argument upon the petitions before the entire Commission, and Commission consideration of the petitions, the railroads voluntarily postponed the operation of the schedules until final Commission order.

In conducting the investigation of the cancelling tariffs under its discretionary powers in Section 15(7), the Commission was presented one controlling issue, not 151 separate issues. This single issue was: Was it "just and reasonable," or unlawful, for the railroad respondents to cancel the special basis of motor-competitive exceptions ratings on all items of less-carload furniture and related articles then enjoying such reduced ratings?

The Questions Presented by Appellant Are Unsubstantial

The assignment of errors is largely general. In only five respects (discussed separately at a later point herein) can the assigned errors be regarded as specific, and in none of these can there be found a substantial or novel question of law meriting the Supreme Court's detailed review of the administrative action in this rate case. A sixth question, more clearly stated in appellant's Statement as to Jurisdiction, is equally unsubstantial in the light of the clear answers available in existing Supreme Court decisions.

Appellant raises no constitutional question, does not contend that the Commission exceeded its statutory authority, and urges no impropriety in the administrative procedure or inadequacy of its opportunity to be heard at all stages of the proceeding. The substance of its argument is only that the Commission improperly applied Sections 1, 2 and 3 of the Interstate Commerce Act in failing to find on the record

that the tariffs involved were unjust and unreasonable, unjustly discriminatory and unduly prejudicial, and that the report of Division 3 of the Commission failed to include subsidiary findings which are legally sufficient to support its ultimate conclusion.

There was not before the Court any substantive question of statutory construction or point of law other than whether the Commission wisely and soundly exercised its administrative judgment in the purely administrative matters presented to it, and whether it recorded with sufficient detail and clarity the basis for its decision. However expressed, the questions now raised by appellant are no more than further efforts to secure a judicial reconsideration and reversal of the basically factual decisions made by the Commission in applying Sections 1, 2 and 3 of the Commerce Act. Every issue before the Commission called for a composite judgment and evaluation of a number of technical transportation facts.

It is well settled that whether rates are unreasonable, unjustly discriminatory or unduly prejudicial in violation of Sections 1, 2 or 3 of the Commerce Act are questions of fact within the exclusive jurisdiction of the Commission, not questions of law for determination by the courts. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546, 548. It is equally clear that in a case such as this, where damages are not awarded by the Commission, the Commission is required only to file a written report stating its conclusions, together with its decision and order, including "basic" or "quasi-jurisdictional" findings and sufficient explication to enable the parties and a reviewing court to understand with a fair degree of assurance why the Commission acted as it did. Section 14(1), 49 U.S.C.A.; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216; *Eastern-Central M. C. Ass'n.* v. *United States*, 321 U. S. 194,

211-212. The Commission report and the opinion of the District Court demonstrate on their face the Commission's conformity to that standard.

Underlying appellant's attack upon the unanimous decision of the three-judge court, the order of the entire Commission and the unanimous report and order of Division 3 of the Commission, is a steadfast refusal to recognize long-established legal principles which are controlling upon the narrow questions presented.

This is an investigation and suspension proceeding under Section 15(7) of the Commerce Act. It is not a complaint proceeding under Section 13 attacking any specific rates or ratings, nor is it a proceeding under Section 15(1) wherein the Commission institutes a general investigation resulting in the prescription of certain rates or ratings. The nature and extent of the administrative findings which are essential depend upon the statutory authority invoked and the context of the situation presented. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 532.

The railroads filed tariffs which merely cancelled an entire basis of motor-competitive exceptions ratings to the full extent that they were applicable on any less-carload furniture and related articles moving via those railroads. Since the existing classification ratings were uniformly more favorable to the shipping public than the basis of maximum reasonable ratings already approved by the Commission in a nationwide proceeding, and since the entire level of basic class rates had been either prescribed or approved by the Commission in recent decisions,[4] the only substantive question presented by the suspended tariffs was whether the railroads should be compelled to continue in effect a depressed basis of ratings established to meet motor com-

[4] The last of these at the time of the hearing was *Increased Freight Rates, 1948*, 276 I.C.C. 9.

petition and to financially assist the furniture industry in a period of severe economic depression.

Supreme Court and Commission decisions made it clear that railroads may not be compelled to maintain lower than maximum reasonable rates in order to meet or cut under the rates of their competitors. *Texas & P. R. Co.* v. *United States*, 289 U.S. 627, 636; *Southern Class Rate Investigation*, 100 I.C.C. 513, 641-2. And in many cases over the years the Commission had consistently indicated general disapproval of competitive or other rate concessions for less-carload traffic below the regular basis of classification ratings, and had repeatedly stated that the railroads would not be required, against their judgment as to competitive and other special conditions, to make such concessions. *Tobacco Merchants Assn's* v. *Aberdeen & R. R. Co.*, 181 I. C. C. 199, 211; *Bananas From Gulf Ports*, 109 I. C. C. 211, 218.

The Commission was not required to suspend the tariffs cancelling the motor-competitive exceptions ratings, and no findings or decision would have had to be issued to support or explain such refusal. The purpose of the discretionary suspension power (limited by Section 15(1) to seven months) is to afford the possibility of a general review of tariffs to determine before their effectiveness whether they are just and reasonable, if an inquiry of that nature appears desirable or necessary. See *Interstate Commerce Commission* v. *I. Waterways Corp.*, 319 U. S. 671, 689-691.

Having accorded to protesting shippers the benefit of suspension and investigation, however, the ultimate Commission finding and the order withdrawing the suspension did not even then constitute a prescription or approval for the indefinite future of the level of each of the individual 367 classification ratings on less-carload furniture, or of the 151 classification ratings superseded by the lower excep-

tions ratings. The Commission's investigation necessarily dealt broadly with the entire basis of exceptions ratings and with the entire basis of classification ratings. Regardless of whether the principle of *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U. S. 370, is applicable to an order in an investigation and suspension proceeding, as distinguished from an order in a complaint proceeding, it is indisputable that the individual classification ratings remain open to direct shipper attack in all respects for the future. If it be assumed (which we deny) that *Arizona Grocery* is applicable, the result would only be to bar a reparations award based upon evidence as to the fact situation existing when the Commission order in this proceeding was issued.

Considering the purpose of an investigation and suspension proceeding under Section 15(7) and the continuing availability of remedy through a complaint, under Section 13 of the Act, making specific attack upon any individual rating or ratings which may be thought unlawful, it would seem apparent that even most abbreviated findings in a Commission report would be adequate to support Commission orders which merely withdraw a suspension which the Commission could in its exclusive discretion have originally declined to issue without any findings or report. Considered in the light of the statutory authority exercised by the Commission and the context of the situation presented to the Commission, appellant's questions as to the adequacy of Commission findings are clearly not substantial.

1. The Question Whether the Commission Orders Are Invalid Because of Absence of Findings as to Rates Other Than on Furniture and as to General Rate Scales—Assigned Errors 6 and 7.

The Commission had before it testimony covering 712 pages of transcript, and 96 exhibits containing statistical and other data. The railroads presented in evidence the results of 14 special studies of less-carload furniture traffic, costs of service, loss and damage, cubic density, and value per pound. Size of shipments, length of haul, revenues per shipment, terminal and line-haul costs, traffic distribution and volume, motor truck ratings and rates, less-carload deficits, the financial condition of the furniture industry, the history of the classification ratings and of the exceptions ratings, the relationship between the present classification ratings and those approved by the Commission in a previous decision, and a great amount of testimony and data as to less-carload operations in general and for furniture traffic in particular were presented. The shipper protestants, including appellant, presented testimony and data on most of the same subjects. Division 3's report, consisting of 12 printed pages, includes concise discussion of the contentions of the parties, the findings made, the conclusions reached and the ultimate finding.

Appellant now says that the Commission's order is invalid because it is not based on findings or evidence comparing furniture rates under the classification ratings with rates on other commodities, and because the report contains no discussion of the general class rate scales.

As to the latter, it is apparent from the report that class rate levels were necessarily considered to the extent material in a case involving ratings, and are reflected in all findings relating to revenues, rate differences and deficits incurred by the railroads in handling less-carload furniture.

Only by application of the ratings to the class rates could those data have been produced.

The Commission's function in this proceeding was to reach an informed and expert judgment in this technical field on the basis of all the many competitive, traffic, revenue, cost, operating and historical facts before it. *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, 592-3; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546.

The Commission decision reflects a composite of all the transportation facts adduced for the record after a most complete hearing. No rule of law makes any one element determinative, controlling upon the Commission, or essential. With a record even more comprehensive in subject matter than its own nationwide investigation of furniture rates and ratings (177 I. C. C. 5), the Commission was not disempowered to withdraw its suspension by reason of failure to include in its report a summary of non-furniture rates prescribed by it in other proceedings which were cited and discussed on brief and in oral argument by the parties to this proceeding. Appellant's argument that the order is invalid because of that failure does not raise a substantial question.

2. The Question Whether the Commission Orders Are Invalid Because of Their Effect upon Three Non-Furniture Classification Items—Assigned Errors 8, 9 and 10.

Among the 151 motor-competitive exceptions ratings cancelled by the suspended tariffs were three items which are known as articles "related" to furniture, rather than furniture itself. These articles are not shown among the 367 times in the Classification under the "Furniture and Furniture Parts" heading. They are shown under the headings "Vehicles Other Than Motor" (baby and doll car-

riages, gocarts and walkers), "Baskets or Hampers" (fiber and wood clothes hampers) and "Racks" (store display racks and stands). These three items are the subject of appellant's assigned errors 8, 9 and 10.

Before the District Court these three non-furniture items were the subject of plaintiff's Motion for Summary Judgment, which the court discussed in its opinion and denied in its judgment. Appellant does not now seek review of the court's action on the Motion.

As the District Court found (p. 44, Statement as to Jurisdiction), the railroads did present to the Commission statistical evidence showing the transportation similarity between the three non-furniture items and the general run of furniture items.[5] The court having found this evidence in the record, the question of whether it is really there (assigned error 10) is not of such substantiality as to justify extended consideration of these proceedings by the Supreme Court.

The fact that the three "related" items were accorded reduced exceptions ratings along with the non-furniture items is fully substantiated in the counter-affidavits before the District Court on the question of the Motion for Summary Judgment. If those affidavits are not in the record (assigned error 9) before the Supreme Court, the reason is solely that appellant does not now challenge the propriety of the court's denial of the motion and, thus, has not brought that portion of the record before the Supreme Court.

Assigned error 8 raises the question whether the Commission's order is invalid in its entirety because the Commission made no subsidiary findings specifically and separately dealing with the three non-furniture items. The

[5] In the record before the Commission, the data appears at p. 10 of Exhibit 1; pp. 3, 9, 10 and 23 of Exhibit 15; pp. 2 and 6 of Exhibit 17 and lines 1, 131, 132 and 133 of Exhibit 28. These exhibits are all included in Exhibit 1 of the record before the court.

court correctly found—and it is a well established principle—that in an investigation and suspension proceeding involving many individual rates applicable on many railroads it would manifestly be impossible, and is not legally required, to make specific findings as to each and every rate. *Assigned Car Cases*, 274 U. S. 564, 583; *United States* v. *Louisiana*, 209 U. S. 70, 75; *Georgia Commission* v. *United States*, 283 U. S. 765, 774; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 82-83; *New England Divisions Case*, 261 U. S. 184, 197-99.

The Supreme Court has also held that an order covering many items, applicable over a wide expanse of territory, and made after protracted proceedings, should not be set aside even if (which we here deny) isolated portions should not have been included therein. *Georgia Commission* v. *United States*, 283 U. S. 765, 772. As in the *Inland Waterways* case, *supra*, the tariff schedules here involved were treated by the parties before the Commission on the theory that in this proceeding they should stand or fall in their entirety.

3. The Question Whether the Commission Admitted in Its Report That the Record Was Inadequate to Permit Subsidiary Findings Sufficient to Sustain Its Ultimate Conclusion—Assigned Error 14.

This extreme position is predicated on the Commission's statement in its conclusions (p. 36, Statement as to Jurisdiction) that the evidence relating to costs "is not conclusive." In the next sentence, however, the Commission went on to express its conviction that "the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic." When fairly read, and in conjunction with the specific cost findings (pp. 30-33) the Commission's final conclusion as to the

cost evidence is perfectly comprehensible and, without more, fully supports its order.

As the report shows, and as railroad cost and operating officers of long experience testified,[6] it is not yet reasonably possible to make a precise study of the cost of carrying one commodity in less-carload service. Railroad cost finding procedures have not yet attained that state of perfection or detail. The Commission would, therefore, have erred if it had said that the cost evidence was "conclusive." The Commission was realistic and accurate in stating that the cost data was "not conclusive." At the same time, however, considering the cost understatements described in the findings (p. 32) and giving proper effect to the findings as to operating expense levels for light density traffic such as furniture (p. 31), it was correct and proper for the Commission to be convinced, and to express its conviction, that the classification ratings would "not do more than compensate" the railroads for the service performed for this traffic.

An administrative report must fairly be read as a whole and particular sentences should not be taken out of context or considered hypercritically. *United States* v. *Pierce Auto Freight Lines, supra*, page 532. Yet this is what appellant does in asserting that the Commission admitted an inability to make adequate subsidiary findings. It is the Commission's duty to weigh all the evidence before it and, in the light of its experience and special knowledge in the transportation field, to reach decisions even in cases where the evidence may not be "conclusive." The fact that the Commission did this does not raise any substantial question justifying review by the Supreme Court.

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[6] Tr. 100, 135-36 in Exhibit 1 before the court.

4. The Question Whether the Commission Orders Are Invalid Because the Report Shows That the Wrong Rule as to Burden of Proof was Applied—Assigned Errors 15 and 16.

Appellant's Statement as to Jurisdiction indicates, at pages 9-11, that these assignments of error are intended to have relationship to the contentions that the tariff schedules violate Sections 2 and 3 of the Commerce Act. Appellant states that it made a *prima facie* case as to each type of unlawfulness, that the Commission made no subsidiary findings as to Section 2 and made only two legally erroneous findings as to Section 3.

Nothing in the Commission report indicates that the ultimate decision is based on failure of proof by either party, regardless of what party might have been regarded as having the burden of proof. Both the railroads and the shipper protestants offered comprehensive evidence on all issues. The Commission's findings are clearly predicated on the entire record. With hundreds of ratings involved, affecting traffic movements all over the country and on many railroads, it would obviously have been questionable for the Commission to find affirmatively, even on the extensive record before it, that *no* unjust discrimination or undue prejudice would occur as to *any* affected shipment. Such a finding could not have been helpful and, on the issues and record, it was unnecessary to the decision. Such a finding might have tended to prejudge the decision in a later complaint proceeding specifically attacking a particular rating on a particular shipment.

Appellant's present Section 2 argument (pp. 9-10, Statement as to Jurisdiction) was presented to the Hearing Examiner as an attack upon a graduated density table as the general basis for classification ratings. The findings

dispositive of that question are in the second full paragraph on page 518 of the Commission report (pp. 33-34, Statement as to Jurisdiction).

Before Division 3 appellant presented the same argument but under the new name of "relative unreasonableness." The Division apparently saw no necessity for dealing anew with the argument because of the different name under which it was presented. The entire Commission did not issue a new report after argument before it of the petition for reconsideration.

The grouping of furniture articles under classification headings reflecting densities and values for those articles, in spite of some overlapping as between groups, is a practical transportation and rate matter for the consideration of the Commission, not the courts. The Commission considered the matter in this proceeding and made appropriate findings.

The Section 3 findings are in no way inconsistent with existing decisions as to the legal significance of rate differences or the extent of carrier responsibility for their elimination. It is settled beyond question that the Commerce Act does not prohibit differences in rates and does not prohibit all discriminaitons or preferences; it only prohibits those which are undue, unjust or unreasonable. *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S. 263, 276; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6, 13. Whether a difference in rates is unlawful is to be determined by application of "the transportation standard," which includes cost of service, value of service and other transportation conditions. *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 521, 524. The lawfulness of cancelling reduced ratings established by Official Territory railroads to meet truck competition encountered by them at the time the exceptions were established does not depend upon contemporaneous action by carriers in other terri-

tories to meet a condition faced by Official Territory roads. The action of the Official Territory roads in this proceeding was uniform and non-discriminatory. These roads cancelled all reduced ratings on all items of less-carload furniture moving over their lines, regardless of origin or destination points.

Whether tariff schedules violate Section 3 of the Commerce Act is a question of fact within the exclusive jurisdiction of the Commission and the Commission report demonstrates a proper exercise of that jurisdiction.

5. The Question Whether the Commission Orders Are Invalid Because of the Statement of the District Court That Remedial Process Is Available to Shippers under the Commerce Act—Assigned Error 17.

Toward the conclusion of its opinion the District Court commented that "if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materialize, remedial process is readily at hand under the Act." (p. 47, Statement as to Jurisdiction). It is apparent that the correctness or incorrectness of that statement has no bearing upon the validity of the Commission orders.

Appellant asserts, however (p. 12, Statement as to Jurisdiction), that the statement is incorrect because of conflict with *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co., supra.* Regardless of the applicability of the *Arizona Grocery* principle, remedial process is indisputably available for the correction of any unreasonableness, undue prejudice or unjust discrimination which may exist with respect to any future traffic movement. The *Arizona Grocery* principle applies only to reparations orders awarding damage for shipments moving at the time of a previous Commission order.

The previous order involved in the *Arizona Grocery* case was issued in a complaint proceeding before the Commis-

sion attacking a specific rate on specific grounds of unlawfulness. That is quite different from the general order issued by the Commission in these investigation and suspension proceedings withdrawing its order suspending the tariffs cancelling reduced exceptions ratings on 151 items of traffic. The principle applicable in this proceeding is that expressed by Mr. Justice Jackson in the *Inland Waterways* case, *supra*. As in that proceeding, the present case was developed and considered before the Commission upon the theory that the tariff schedules must stand or fall in their entirety. Appellant's attack upon certain individual ratings, both before the Commission and before the District Court, was in support of an argument that the entire tariffs were unlawful. The Commission's withdrawal of its suspension of the tariffs did not convert each and every one of the 367—or of the 151—classification ratings into Commission-prescribed ratings, as distinguished from carrier-made ratings. For that reason, the individual classification ratings are still open even to retroactive attack in complaint proceedings under Section 13 of the Commerce Act, and are not immunized from such retroactive attack by the principle of the *Arizona Grocery* case. See the discussion and citations, particularly in footnote 21, in the *Inland Waterways* case, *supra*, at pages 685-687.

6. The Question Whether the Orders Are Invalid Because of a Failure to Make Subsidiary Findings Bridging a "Gap" Between the Findings Made and the Ultimate Conclusion.

Running through appellant's Statement as to Jurisdiction is reference (pp. 6, 7, 8, 15, 16) to an absence of "bridges" between the findings made and the ultimate conclusion of reasonableness of the suspended schedules, to a lack of findings which "could give validity" to the findings made,

and to a contention that the findings made are "meaningless."

The Commission's report itself reveals the lack of substance in appellant's illusion of a "gap" between the many findings made and the ultimate conclusion that cancellation of the reduced exceptions ratings was just and reasonable. The report specifically sets forth the graduated density table which is the general basis for the classification ratings and which in general governs the relationship between the 367 ratings on furniture articles of varying density, value, susceptibility to damage and other classification elements. Classification ratings for the individual items, on that basis and on various other bases, were before the Commission in exhibit form (Ex. 3) and typical portions thereof were reproduced in findings (p. 26, Statement as to Jurisdiction). The average revenue, cost, value, damage, traffic and other data for less-carload furniture as a class, and for the 151 specially-affected items, were addressed to the general questions of whether the basic density table was on a proper level for the highest and lowest ratings and whether there was economic justification and traffic necessity for cancellation of the competitive exceptions ratings. The conclusions expressed by the Commission under the heading "Conclusions" (p. 36) could hardly more clearly constitute a rational "bridge" between the many subsidiary findings and the ultimate conclusion.

Appellant's suggestion is essentially an argument that the Commission had a duty to spell out in detail all the mental processes employed, the experience and skill drawn upon, and the weight given to each item of evidence, in reasoning from specific findings to general conclusions and then to the ultimate conclusion.

The Commission doubtless could have done this, as it could also have made many additional but uncontrolling

findings and cited and discussed many recent Commission decisions (which were discussed before it on brief and in oral argument) as to the proper level of less-carload ratings for articles of various densities and values. But the failure to do these things establishes no error of law rendering the orders invalid.

The report plainly shows that the Commission reached its conclusion on the basis of the record, that its conclusion is sensible and that it considered the arguments and evidence on both sides of the controversy. Nothing more is required. *Alabama Great Southern R. Co.* v. *United States, supra.* Whether the Commission failed to do more than is legally required is not a substantial question for review by the Supreme Court.

Conclusion

The Commission report is rational and is based upon supporting data. The only issues in the proceeding were questions of "reasonableness," "unjust discrimination" and "undue prejudice"—all questions of fact within the exclusive jurisdiction of the Commission and calling for the exercise of informed and expert judgment in a technical field. The District Court did not err in dismissing the complaint attacking the Commission orders. The appeal attacking the District Court's judgment presents no substantial question.

The tariffs involved are now effective and have been so since May 8, 1951. Any specific ratings governing the freight charges on any particular furniture items may be directly attacked at any time by complaint filed with the Commission under Section 13 of the Commerce Act. The Commission orders here attacked merely withdrew the suspension of the tariffs, after the Commission's 7-month suspension power had been exhausted nearly three times. No

important public interest would be served by remanding this proceeding to the Commission for a further and more detailed report.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees

BRIEF ON BEHALF OF NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., OPPOSING APPELLEES' MOTIONS TO AFFIRM

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Supreme Court of the United States

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No.

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

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BRIEF ON BEHALF OF NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., OPPOSING APPELLEES' MOTIONS TO AFFIRM

STATEMENT OF THE CASE

This is a direct appeal to the Supreme Court of the United States from a final judgment of a specially-constituted three-judge District Court in the District of Massachusetts (hereinafter called the District Court), which dismissed a complaint seeking to set aside certain orders of the Interstate Commerce Commission (hereinafter called the Commission). The judgment of the District Court was rendered

September 11, 1951. This appeal was allowed, a citation was issued, and the requisite appeal papers, including a Statement as to Jurisdiction, were filed with the Clerk of the District Court, on November 9, 1951. Appellees United States of America and Interstate Commerce Commission served upon appellant's counsel, on November 21, 1951, a copy of their Motion to Affirm, and appellees The Pennsylvania Railroad Co. and the other interveners as parties defendant in the proceeding below served upon appellant's counsel, on or about November 23, 1951, a copy of their Motion to Affirm.

This brief is filed by appellant in the Supreme Court of the United States pursuant to Rules 7 (3) and 12 (3) of the Revised Rules of the Supreme Court of the United States, in opposition to both of the aforesaid motions.

ARGUMENT

The appellant's Statement as to Jurisdiction sets forth the reasons why the issues raised by this appeal are substantial, and such reasons need not be restated herein. However, the picture painted by appellees in their respective motions is factually incorrect, legally erroneous and, in its overall effect, thoroughly misleading. Moreover, appellees' insistence that the numerous defects in the report and orders of the Commission and in the record upon which said report and orders are based may be cavalierly brushed aside as unimportant and insubstantial, and their further insistence upon obscuring appellant's simple, relevant and substantial arguments with a smoke scree. of denials and of refutations of hypothetical issu

and arguments never raised or advanced by appellant, call for a further, clarifying statement of appellant's position in this case and of the flagrant and substantial errors of law, which, in appellant's opinion, will cause this Court, after full consideration of the case upon its merits, to reverse the Commission's orders, and the District Court's judgment affirming such orders.

POINT I

The Railroad Respondents Misrepresent the Nature of the Issues Before the Commission.

Convincing proof of the merit of the appellant's appeal in this proceeding is afforded by the railroad respondents' endeavor to becloud the nature of the issue before the Commission. These respondents recognize the basic inadequacy of the Commission's report, which inadequacy flowed (as is pointed out hereinafter and in the Statement as to Jurisdiction) from the failure on the part of the railroad respondents themselves to sustain the burden of proof imposed upon them by statute. They further recognize that the manner in which the District Court supported the Commission's decision is indefensible. That Court, awed by the "expertise" of the Commission, merely "assumed" that the Commission must have had "in mind" facts concerning the general rate structure which would lend support to its ultimate conclusion, and the railroads are well aware that the Commission's report cannot be permitted to stand on that basis. Being unable to support the Commission's decision in accordance with recognized principles of judicial review and having

available from the District Court only an untenable decision, the railroads, in desperation, assert to this Court that the issue before the Commission was not whether the proposed new ratings were lawful (which the Commission and the District Court both recognized to be the issue) but merely whether cancellation of the old ratings was lawful and, alternatively, that the issue before the Commission was merely whether withdrawal of the suspension order was proper. The railroads have not even yet determined definitely as between these two assertions. Thus, at one point in their Motion to Affirm, the railroad respondents purport to state the sole issue before the Commission as follows:

> "This single issue was: Was it 'just and reasonable,' or unlawful, for the railroad respondents to cancel the special basis of motor-competitive exceptions ratings on all items of less-carload furniture and related articles then enjoying such reduced ratings?"

They then point to findings which they contend to be adequate to support a determination favorable to them on this issue. A few pages later in their motion, however, the railroad respondents assert that the issue before the Commission was merely whether the Commission should withdraw its suspension orders, and, in this regard, the railroads say:

> ". . . it would seem apparent that even most abbreviated findings in a Commission report would be adequate to support Commission orders which merely withdraw a suspension which the Commission could in its exclusive discretion have originally declined to issue without any findings or report."

The railroads' purported analysis of the issues before the Commission and their statements as to what the Commission decided are, of course, patently unsound, and the carriers' recognition of this is shown by their efforts to justify the classification ratings. If there were any merit in the assertion of the railroad respondents that the Commission had approved only cancellation of the exception ratings or had merely ordered withdrawal of its suspension orders and had not approved the classification ratings, then the Commission's report would obviously be invalid for want of even an appropriate "ultimate finding". Section 15 (7) of the Interstate Commerce Act* (hereinafter called the Act) expressly requires that, in investigation and suspension proceedings, the *new rates or ratings* must be approved or disapproved as just and reasonable, and, if the Commission had not acted with reference to the new ratings, it obviously would have had no authority to enter a final order. The contention has never heretofore been advanced, we believe, that a carrier could satisfy the requirements of Section 15 (7) merely by showing the inappropriateness of the existing rates proposed to be canceled. The most which has heretofore been contended is that a carrier might show that the *amount* of a proposed increase was justified without a showing that the increased *rate itself* was justified. But even this claim was early rejected. As Professor Sharfman points out, after noting that the British Railway and Canal Act of 1894 required carriers merely to justify proposed

*24 Stat. 379, as amended, Title 49, United States Code, Section 15(7).

increases in their rates as distinguished from the proposed new rates themselves,

> "Under the American statute, on the other hand, there was no such recognition of the reasonableness of existing rates, and the burden of proof was expressly made applicable to 'the increased rate.'" Sharfman, *The Interstate Commerce Commission*, Part III B, pp. 35-36 (1936),

and as the Commission itself said, in *Advances In Rates—Western Case*, 20 I. C. C. 307, 316 (1911),

> "The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it — if challenge is made either by this Commission or otherwise — the burden of justifying its action. Theirs . . . is 'the risk of non-persuasion' . . . The railroad must assume to prove to this Commission *that the new and increased rates are within the words of description and limitation used in the act;* that is, that, *they are just and reasonable.*" (Emphasis supplied.)

If the Commission's ultimate findings of justness and reasonableness were confined to the cancellation tariffs—and were held not to apply to the new, and much higher, classification ratings on which the carriers will base their charges—it would be obvious, *without any further analysis whatsoever,* that the statute had been completely ignored.

If the railroads are to be taken as seriously believing that the Commission had before it only the issue of whether cancellation was justified or the issue of whether withdrawal of the suspension might be appropriate, and not the issue of reasonableness of the classification ratings, the dearth of appropriate evidence—and the consequent lack of appropriate

findings in this case—which appellant points out hereinafter and in its Statement as to Jurisdiction, would be easily explained. Obviously, if the carriers tried their case before the Commission on the wrong theory—believing it unnecessary to justify the new ratings—it is understandable that they would not offer the types of evidence which we have noted is essential in justifying proposed ratings, and it is also understandable that they would not attempt to relate their cost and other evidence to the new ratings.

POINT II

The Commission Has Failed to Make the Subsidiary Findings Necessary to Sustain its Ultimate Conclusion that the Ratings Proposed Were Just and Reasonable, In Conformity With Section 1 of the Act, and Had No Evidence Upon Which Such Findings Could Have Been Based, Even If They Had Been Made.

In determining the reasonableness of new ratings or rates, comparisons with other and existing ratings or rates applicable to commodities having similar transportation characteristics are the essentials of the normal method. No such comparative findings were made in this case, and none could have been made on the basis of the evidence of record. Moreover, the twenty-year-old discredited decision of the Commission in *Furniture*, 177 I. C. C. 5 (1931) cannot be called upon to supply the findings and evidence missing from this report and record.

In the absence of comparisons, findings to the effect that the ratings proposed are no more than reasonably compensatory, based upon adequate evidence as to the cost of, and the revenues reasonably to be expected from, the services rendered, also might

have established the justness and reasonableness (under Section 1) of the proposed ratings. Yet no such valid finding was made by the Commission herein, and the record is totally devoid of any *revenue* evidence upon which such a remuneration finding could have been based.

Absent both of these crucial types of findings, the fragmentary and unrelated findings contained in the Commission's report are not, without more, relevant to, and do not support, the Commission's ultimate conclusion that the proposed schedules "are just and reasonable and not otherwise unlawful."

A. *The Commission Has Admittedly Failed to Make Any Findings Based Upon Comparisons Between the Proposed Ratings and Those of Other Commodities Having Similar Transportation Characteristics, and Could Not Have Done So On the Basis Of The Evidence Of Record.*

Customarily, the justness and reasonableness under Section 1 of the Act of new ratings or rates is proved by evidence that such ratings or rates are similar to those applicable to other commodities which have comparable transportation characteristics. If the ratings or rates of such other commodities have been prescribed by the Commission, or have been in effect for a reasonable period of time, so that they may be presumed to be just and reasonable, such comparisons tend to prove, at least *prima facie*, that the proposed new ratings or rates are also just and reasonable. But as appellant has argued before the District Court (and appellees admit), no findings based upon such comparisons were made

by the Commission; nor could they have been made upon the record herein.

Railroad appellees admit the absence of these requisite findings, but imply in their Motion to Affirm that comparisons with non-furniture rates prescribed in other proceedings are contained in the record and were in fact considered by the Commission, though reference thereto was omitted from its report. The only "evidence" which the railroads could conceivably have reference to were a few lines of testimony enumerating six commodities for which the Commission had, at one time or another, upheld ratings approximately as high as the new less-carload furniture ratings, including such highly fragile and non-comparable items as ice cream cones, dishes and neon electric signs whose different transportation characteristics are obvious at first glance. It was clearly proper for the Commission to ignore this meaningless and irrelevant testimony, as it did, if only for the reason that the weight characteristics of the ice cream cones and other items were shown to be quite different than those in the density table upon which the furniture ratings purport to be based.

Moreover, the guessing game which appellees seriously urge this Court to engage in as to the evidence relied upon by the Commission in support of its ultimate conclusions, points up better than any argument which appellant could advance the function of, and necessity for, subsidiary findings disclosing clearly the basis of the Commission's action. The short answer to appellees' foregoing contention is that, as they admit, the requisite comparative findings are lacking, and it is not a judicial function to make

such findings for the Commission. This Court must not be led, out of a desire to uphold an administrative decision, to sustain the decision by supplying findings which the Commission failed to make, and which it would not and could not have made on the basis of this record.

The District Court dealt with the absence of the comparative findings and evidence normally required in cases such as this by stating that—

> "we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity."

By thus assuming that the Commission must have done everything it ought to have done, the District Court once again demonstrated its general disposition to regard the administrative process as a mysterious but infallible rite, as to which it must abdicate usually essential and well-established methods and principles of judicial review. The question whether or not it has erred in so doing is of vital importance to the shippers represented by appellant herein.

B. *The Twenty-Year-Old, Stale and Discredited Furniture Opinion Cannot be Called Upon to Supply the Missing Comparative Findings and Evidence Herein.*

Even the District Court, in refusing the relief prayed for by appellant, completely ignored appellees' attempt to use the twenty-year-old opinion of the Commission in the *Furniture* case (*Furniture*, 177 I. C. C. 5) as a cure-all for the defects in the Commission's report and in the record, for the obvious

reason that it has no relevance whatsoever to the instant proceeding. Nevertheless appellees advert to this opinion repeatedly in their Motions to Affirm, implying again that if their evidence before the Commission falls short of proving the new ratings just and reasonable, then the fact that they are substantially similar to the ratings approved by the Commission in the 1931 *Furniture* case automatically establishes the lawfulness of the new schedules.

Appellants believe that this unmeritorious contention is answered adequately on pages 8-9 of the Statement as to Jurisdiction. As therein pointed out, the ratings prescribed in the old *Furniture* case were permitted to become effective for a period of only a month or two twenty years ago and were immediately recognized as unsound by everyone affected thereby. The Commission agreed to reopen the proceeding and reconsider its order. Although the proceeding was ultimately closed without rehearing, this action was taken by the Commission upon the shippers' request, only after the carriers had agreed not to apply the unrealistic and prohibitively high ratings originally recommended, but to substitute therefor the exception schedules whose cancellation gave rise to the instant proceeding. Moreover, even if the obsolete *Furniture* decision had been considered sound in 1931 (which it was not), it could not now be accorded weight in a proceeding between different parties and after a lapse of more than twenty years, during which the rates applicable to these ratings have been vastly increased and during which packing requirements have been materially changed in such a way as to make the traffic far more attractive to the carriers from the standpoint of density and

risk of damage, but far more expensive per unit for the shippers to ship.

The Commission must make its determinations on the basis of the record before it in this proceeding, and not on the basis of one which is twenty years old, and to which appellant was not even a party. See *The Chicago Junction Case*, 264 U. S. 258, 263; *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274. Reliance by the Commission upon its decisions in other cases to bolster a deficient record was expressly disapproved in *Erie Railroad Co.* v. *United States*, 59 F. Supp. 751 (S. D. Ohio 1944), wherein the Court said—

> ". . . no evidence was introduced which tends to establish the unreasonableness of the rates . . . but on the basis of its decisions in other cases, it (the Commission) held that the rates were unreasonable. *This constituted prejudicial error.*" (Emphasis supplied.)

Clearly appellees' last-ditch attempt to resurrect, in their Motions to Affirm, the stale and obsolete *Furniture* decision as a prop for their unsupportable position in this case must fail here, as it did even before the District Court.

C. *No Valid Finding That the Proposed Ratings Will be No More Than Reasonably Remunerative Could Have Been Made by the Commission Herein, Nor Has Such a Finding Actually Been Made.*

A valid finding that the ratings proposed would result in rates no more than reasonably remunerative might have adequately supported the Commission's conclusion that the proposed schedules are just and

reasonable under Section 1, provided that such finding were made and were supported by substantial evidence. No such finding, however, could have been made by the Commission on the record before it, nor has such a finding actually been made.

The following statement by the Commission in its report herein is pointed to by appellees as supplying such a finding:

> "The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived *from the exceptions basis* to compensate for the cost of the service. From the evidence before us, we are convinced that the *classification ratings proposed* will not do more than compensate the respondents for the service performed on this traffic." (Emphasis supplied.)

If the second of these two sentences could be divorced from the confusion of inability-to-find which is implicit in the first sentence, and such second sentence could be deemed a finding of remunerativeness, the "finding" would have to be stricken for want of support in the evidence. Remunerativeness imports a comparison of cost or outgo, on the one hand, with revenue or income, on the other hand. Unless data with respect to both estimated costs and estimated revenues are available, it is impossible to say whether given rates will be remunerative or, if remunerative, how remunerative. Although it is admitted that cost data were submitted for the Commission's consideration in this case (and the only issue in that regard is whether the Commission has not rejected such evidence as wholly inconclusive),

no one has suggested that the Commission heard any evidence which would indicate the extent of the revenues reasonably to be derived from the new classification ratings. The railroad respondents do not assert that any such revenue evidence was offered, and the District Court conceded that none was, when it sought to excuse the omission on the ground that no one could predict "accurately" the amount of traffic which would move upon the new ratings. In the absence of such revenue evidence, the Commission obviously was no more in a position to make findings concerning remunerativeness than is a businessman, having only an idea what his *expenses* will be, to estimate his *profits*.

While the sentence upon which the railroad respondents thus rely (the second of the sentences last above quoted) is, if a finding at all, a completely unsupportable finding, the fact of the matter is that the sentence itself may not properly be deemed to be a finding. The Commission's statement of its conclusions with respect to the carriers' prospective profits under the new schedule, considered as a whole, clearly indicates the Commission's dissatisfaction with the cost evidence and its inability to make even a *costs* finding bearing upon the issue of remunerativeness. When the Commission can derive no more than "serious doubt" as to the inadequacy of *existing* schedules in compensating the carriers for their costs, it seems incredible that nevertheless that same record could "convince" the Commission that *new ratings* which, as it has found, are on the average

from 58.7% to 76.3% higher than the existing ratings, will do no more than fairly compensate* the carriers.

D. *The Subsidiary Findings Which the Commission Has Made Are Unrelated and Irrelevant to (and Are Clearly Not Such Typical or Representative Findings as Would Support) the Commission's Ultimate Conclusion That the New Ratings Do Not Violate Section 1 of the Act.*

In attempted refutation of appellant's claim that the aforementioned crucial subsidiary findings are lacking in the Commission's report, and could not have been made on the basis of the record before the Commission, the District Court stated in its opinion:

> "Well over a dozen subsidiary findings were made (by the Commission) covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture, i.e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic."

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*In order to consider the Commission's report in the light most favorable to its validity — and not hypercritically as appellees allege — the word "fairly" has been interpolated in the Commission's said finding. Without such interpolation, the finding that the new schedules "compensate the respondents for the service performed" is meaningless. Actually, appellant believes that the Commission purposely omitted the word which might have given meaning to this finding, because it knew that it was impossible to make such a meaningful finding on the record.

By thus being lulled into complacent recital of these findings, without thought as to their possible relationship or non-relationship to the Commission's ultimate conclusion, the District Court fell victim to the carriers' effort at all stages of this proceeding to conceal the essential weakness of their case behind a barrage of voluminous and quantitatively impressive evidence, which caused the District Court to give up in despair by saying that—

> "To analyze the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the 'begat' chapters of the Book of Numbers."

But a purposely cumbersome and unnecessarily huge record should not be allowed successfully to camouflage administrative laxity, nor to place Commission action based upon such a record beyond effective review by the courts. The Commission makes no findings based upon comparisons and had no evidence supportive of such findings, so that the subsidiary findings referred to by the District Court cannot be deemed the basis for the customary comparisons with other, similar commodities. So far as concerns remunerativeness, it is clear that whether proposed increased freight rates are remunerative or not cannot be proved unless evidence of the reasonably anticipated cost to the carriers of rendering the service in question is compared with the revenue which the carriers may reasonably be expected to receive therefrom. It would seem to be almost too clear to warrant extended discussion that the alleged findings summarized by the District Court in the

passage hereinbefore quoted (wherein revenues are, of course, never mentioned), and evidence supportive of such findings, have no bearing at all on the Commission's conclusion (if such it be) that the new ratings will do no more than fairly compensate the carriers for the service performed. Nor, of course, do such findings provide any indication that the Commission (although it makes no mention thereof) might have been guided by comparative considerations.

As a further part of the general smoke screen thrown up by the carriers to hide the legal insufficiency of their case, appellees attempt to make it appear in their motion as though appellant's case before this Court is grounded in large part upon the argument that the carriers should have proved affirmatively before the Commission the justice and reasonableness of each and every one of the 151 ratings which were to be increased. Obviously, appellant makes no such unreasonable contention and is in complete agreement with the statement of the District Court herein that—

> "typical or representative findings resting upon typical or representative evidence are all that is required . . ."

Appellant's contention is simply that there are, in the Commission's report, as hereinbefore pointed out, no legally sufficient findings whatsoever—typical, representative or otherwise—either with respect to furniture generally or with respect to the aggregate group of 151 items whose ratings were being increased or even with respect to a single one of those 151 items (let alone a representative cross-section thereof), and that there was in the record before the

Commission, as hereinbefore pointed out, no evidence upon which any such legally sufficient findings might have been based.

POINT III

The Commission Has Made No Valid Findings in Support of Its Conclusion that the New Schedules Do Not Violate Sections 2 and 3 of the Act, and Could Not Have Made Such Findings on the Basis of the Evidence of Record.

The Commission's ultimate conclusion was that the suspended schedules were "just and reasonable" (i. e., do not violate Section 1 of the Act), "and not otherwise unlawful", which is a finding that they also do not violate Sections 2 and 3 of the Act.

A. *The Commission Has Not, and Could Not Have Made Any Findings to Overcome Appellant's Clear Showing That the New Ratings Will Result in Unjust Discrimination Violative of Section 2 of the Act.*

Appellant called to the District Court's attention the fact that the Commission's report is totally devoid of any findings whatsoever with reference to Section 2. Appellees admit that the Commission made no such findings and could not have made them upon the record before it, but claim that these findings were unnecessary because

> "The grouping of furniture articles under classification headings reflecting densities and values for those articles in spite of some overlapping as between groups, is a practical transportation and rate matter for the consideration of the Commission, not the courts."

Thus once again appellees attempt to defend the Commission's decision in their favor by hiding its defects behind the cloak of administrative expertise.

As appellant has pointed out in its Statement as to Jurisdiction, *the carriers* had the burden of proving that the proposed new ratings *will not create* unjustly discriminatory rate relationships. *Appellant* made a strong, *prima facie* case before the Commission showing that the new ratings will create a multitude of such unlawfully discriminatory relationships, and this showing stands unrefuted by any evidence of appellees. For example, the shippers pointed out that, under the classification ratings, *identical items of furniture* carry different ratings and consequently pay different rates *depending upon their intended use* (Tr. 637), and also that many items of furniture, so substantially similar as to be entitled to equal treatment pursuant to Section 2, are assigned different ratings and, accordingly, afforded unequal treatment (Tr. 635). The impropriety of such practices is clear. As Professor Sharfman points out in his aforementioned treatise,

> "Use as such has been consistently deemed irrelevant as a rate factor; indeed . . . the imposition of different rates on the same commodity with respect to its different uses has been repeatedly condemned as violating the principle of equality." (P. 486)

and, as the Commission said, in *Western Classification Case*, 25 I. C. C. 442, 499 (1912),

> "Transportation charges may not be properly predicated upon the use to be made of an article offered for transportation."

So also, Section 2 is well and clearly understood to prohibit discrimination as between like commodities,

whether or not identical. As this Court said, in *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission,* 162 U. S. 197,

> "The term 'a like kind of traffic' as it occurs in Section 2 of the Act to regulate commerce, and as used in this report and opinion, does not mean traffic that is identical, but it means traffic that is of 'a like kind' with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference."

See also *Douglas & Co.* v. *Illinois Central R. Co.*, 31 I. C. C. 593 (1914).

Moreover, there is no question concerning the facts. The carriers do not deny that, as an illustration, the item of furniture shown on Sheet 1 of Exhibit 92 may be sold as a desk, in which event it would move on a one and one-half times first class rate or may be sold as a vanity base, in which event it would move on the first class rate. There is also an abundance of undisputed evidence showing that highly similar articles take wholly different ratings. To illustrate, Exhibit 92 shows a lamp table and a straight chair virtually identical in design and construction, and with practically the same density and value characteristics being assigned to first class and double first class, respectively. Another comparative illustration in the same exhibit shows a wing chair and a sofa, obviously "like kinds of traffic", assigned ratings of double first class and one and one-half times first class, respectively. The height of absurdity and unjust discrimination is revealed on still another page of the exhibit (page 4) wherein it is shown that an overstuffed sofa is assigned a first class rating,

whereas its *matching counterpart*, an overstuffed chair, must be charged one and three-quarters times such first class rate, notwithstanding the fact that the two pieces have virtually the same density and value characteristics and obviously are identical in all transportation characteristics relating to movement and handling, since they almost invariably are sold and shipped in sets. Moreover, as Witness Bohman pointed out, these illustrations are merely typical; instances of similar unjust discrimination are myriad (Tr. 636).

Notwithstanding the importance of this Section 2 issue, however, the Commission's report is completely silent as to its reasons for ignoring the shippers' strong and undisputed *prima facie* showing in the matter.

B. *In Support of Its Erroneous Conclusion That the Proposed Ratings Will Not Be Violative of Section 3 of the Act, the Commission Has Made Only Two Purported Findings, Which Are Contrary to the Evidence of Record and, In Addition, Are Improper As a Matter of Law.*

The Commission has mentioned the shippers' contention that the proposed new ratings will result in undue preference and prejudice, in violation of Section 3 (1) of the Act, in only two sentences of its report. If these are the subsidiary findings relied upon by the Commission in support of its ultimate conclusion as to Section 3 compliance (and there are no others on which it could rely), the Commission has clearly failed to make the findings necessary to overcome the shippers' *prima facie* case of unlawfulness.

To establish their *prima facie* case of Section 3 violation, the shippers pointed out that, in many instances, following establishment of the new high classification ratings within Official Territory and on interterritorial shipments to and from Official Territory, particular shippers would be placed at a substantial rate disadvantage in attempting to compete with other shippers shipping their freight under similar circumstances, and also pointed out that the same carrier or carriers would be parties to the arrangement giving rise to such unequal treatment. To illustrate, a shipper in Gardner, Massachusetts is clearly prejudiced if he pays higher freight charges to reach a market in the South, such as Atlanta, Georgia, than the railroads in the South charge a Southern manufacturer whose goods must move the same distance to reach Atlanta.* If the Southern Railway is the carrier for the Southern producer and also participates, with its connections, in the haul from Gardner to Atlanta, the Southern Railway is clearly a participant in the improper arrangement, and could cease to be so by either withdrawing its concurrence to the high rates from Gardner or increasing its rate from the southern point.

In dealing with the shippers' contentions relative to the Section 3 unlawfulness which is thus inherent

*In the Commission's recent decision in the *Class Rate Case*, (262 I. C. C. 447 (1945)) the Commission held that differences in transportation conditions in Official Territory, Southern Territory and Southwestern and Western Trunk-Line Territories were not sufficiently great to warrant differences in mile-for-mile class rates.

in the new ratings, the Commission makes only two purported findings, namely, the negative finding that,

> "As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice."

and the obscure, as well as wholly unwarranted, finding that,

> "There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice."

The first of these purported findings is, as hereinbefore pointed out, cast in language which would indicate that the Commission had overlooked the fact that, once the issue of undue prejudice has been properly raised, as it clearly has in this instance, the burden of being persuasive is on the carriers. This finding is accordingly wrong as a matter of law and meaningless in the context of this case.

The second purported finding is also clearly erroneous as a matter of law. Thus, the confusing conclusion that there is "no indication of competition, with effective control of the rates by a carrier or carriers" could not conceivably mean that there was an insufficient showing of competition between furniture markets and producing areas in Official Territory and those in other territories, in view of the Commission's own findings, as set forth in its report herein, with respect to the furniture industry in general, its peculiar makeup and geographic distribution, its nationwide marketing and the importance of

interterritorial furniture traffic. Moreover, such an interpretation of the Commission's obscure finding is precluded by the evidentiary standards which the Commission itself has heretofore established with respect to showing of competition. Thus, it stated in *Acme Mills* v. *A. G. S. Ry. Co.*, 136 I. C. C. 114 (1927),

> "The evidence presented, as already indicated, consists very largely of rate comparisons showing the maladjustments above mentioned, and there is only meagre evidence of record with respect to the competition which exists between the complainant merchants and manufacturers and those at the points alleged to be preferred, or with respect to the specific effect of the maladjustments upon complainants. ***But the manifest purpose of Section 3 will not be served if it is given an interpretation narrower than the broad and comprehensive language justifies.*** Whatever may be the case with respect to reparation for what has happened in the past, *no good reason appears, so far as the future is concerned, why we should permit cases of maladjustments of rates* which at all events threaten injury, *to continue until specific and detailed evidence of actual injury is presented* at great labor and expense to the injured parties." (Pp. 118-119) (Emphasis supplied.)

A more probable interpretation of the Commission's last-mentioned purported finding (though one which, in appellant's opinion, is erroneous) is that the Commission thought that the requirement under Section 3(1) of the Act that there be effective control both of the preferential and the prejudicial rates was lacking in this case. Appellant objects to this conclusion (if such it is) as plainly wrong as a matter of law.

In the recent case of *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573 (1948), this Court

affirmed a finding by the Commission that the Milwaukee and Illinois Central Railroads were violating both Section 2 and Section 3 of the Act in a factual situation described by the Court, as follows:

> "The Milwaukee and Illinois Central were granting more favorable rates to some origins than to others in the same groups or districts. Their single-line rates from mines on their own lines were much lower than joint-line rates from other mines in the same group to the same destinations. The latter are rates published by other carriers and in which Milwaukee and Illinois Central join. Milwaukee and Illinois Central therefore are parties to an arrangement which results in some mines getting lower rates than other mines in the same group on shipments to the same destination."

The fact is undisputed that many southern and western cities are important furniture markets, and that Official Territory producers must, in order to compete in such markets, use the southern and western railroads, which maintain low exceptions ratings for southern and western producers, but join with the Official Territory carriers in publishing the high classification ratings for Official Territory producers. Appellant submits that the principle of the *Ayrshire Collieries* case, supra, is therefore also governing in this case, and the Commission's conclusion that there is "no indication" of effective control of the rates by a carrier or carriers is plainly unwarranted.

However, if this Court were to determine (contrary to appellant's foregoing contention) that *Ayrshire Collieries* is not applicable here, then the instant case would seem to raise squarely the important question of law which this Court expressly left un-

decided in the *Class Rate Case**, so called. In that case, the Court described what is essentially also appellant's argument in this case as follows:

> ". . . it is said that carriers in Official Territory control rates within that area, and also control, jointly with the carriers in each of the other Territories, the rates from each of them into Official. That common source of discrimination is said to be sufficient to sustain the Commission's action. See *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 62 L. Ed. 199, 38 S. Ct. 49; *Chicago I. & L. R. Co.* v. *United Staes*, 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226. *But we do not need to decide the question.*" **(Emphasis supplied.)**

The conditions which appellant contends are violative of Section 3 in the instant case are almost precisely those described by the Court in the aforesaid quotation, and the legal conclusions which, in appellant's opinion, follow therefrom, are identical with those advocated in the quoted argument. As hereinbefore set forth, Southern Territory carriers, for example, control the rates within their territory, and also control jointly with Official Territory carriers the interterritorial rates between Southern and Official Territories. Preference and prejudice result from the fact that the intraterritorial rates remain at the old level, while the interterritorial rates have risen drastically as a result of the Commission's orders herein challenged. In appellant's view, this creates an unlawful rate relationship violative of Section 3 of the Act. The requisite "common source of discrimination" (which is probably the same element as that considered lacking by the Commission when it found "no indication" of "effective control")

**New York et al* v. *United States et al*, 331 U. S. 284, 342 (1947).

is found in the instant case — as in the argument quoted above from the *Class Rate Case* — in the common control of both rates by Southern Territory carriers.

Irrespective of whether the instant case is governed by the rule of *Ayrshire Collieries* or raises the foregoing problem left open for future decision in the *Class Rate Case*, at least one point should be clear beyond all doubt from the foregoing discussion, namely, that the question whether the Commission's orders herein are violative of Section 3 of the Act presents substantial and important issues of law, and not, as the railroad appellees attempt to persuade this Court, purely

> "a question of fact within the exclusive jurisdiction of the Commission."

This patently misleading statement once again furnishes an example of appellees' frantic efforts, throughout these proceedings, to prevent at all costs thorough judicial review of the decisions of the Commission and the District Court herein. They know that such a review by this Court can only result in reversal of the unsound and legally insufficient decisions below.

CONCLUSION

For the foregoing reasons, appellant submits that this appeal raises substantial questions concerning the propriety and lawfulness of arbitrary, unsupportable and patently deficient action by the Interstate Commerce Commission. These are important questions of law, which lie far beyond the scope of the Commission's "exclusive jurisdiction" and "admini-

strative expertise", and which are properly and of necessity subject to judicial scrutiny and review. Appellees' motions to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief upon counsel for the adverse parties in this proceeding by causing a copy thereof to be mailed, postage prepaid, to each of said counsel.

Dated this 11th day of December, 1951, at Boston, Massachusetts.

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Encl

No. 476. NATIONAL FURNITURE TRAFFIC CONFERENCE, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Massachusetts. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Board of Trade* v. *United States*, 314 U. S. 534. *Henry E. Foley* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Francis L. Brown, R. J. Fletcher* and *John Dickinson* for the Pennsylvania Railroad Co. et al., appellees.